(32,049)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 482

HENRY W. McMASTER AND FRANCIS H. SKELDING, AS RECEIVERS OF THE WABASH PITTSBURGH TERMINAL RAILWAY COMPANY, PETITIONERS,

vs.

GEORGE J. GOULD, KINGDON GOULD, ET AL., AS EXECUTORS, ETC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

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IN COURT OF APPEALS OF NEW YORK

HENRY W. MCMASTER and Ano., as Receivers &c., Appellants,

against

GEORGE J. GOULD & Others, Defendants; KINGDON GOULD and Ano., as Exrs., &c., Appearing Specially, &c., Respondents.

REMITTITUR MAY 15, 1926

Be it remembered, That on the 29th day of March in the year of our Lord one thousand nine hundred and twenty-six, Henry W. McMaster and another, as Receivers, &c., the appellants in this cause, came here unto the Court of Appeals, by Larkin & Perry, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Kingdon Gould and another, as Executors, &c., specially, &c., the [fol. c] respondents in said cause, afterwards appeared in said Court of Appeals by Chadbourne, Stanchfield & Levy and others, their attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. James Marshall, of counsel for the appellants, and by Mr. William Wallace, Jr., of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the appeal from the order of the Appellate Division of the Supreme Court herein be and the same hereby is dismissed with costs.

And it was also further ordered, that the record aforesaid, and the proceedings of this Court, be remitted to the said Supreme Court there to be proceeded upon according to law.

Therefore, It is considered that the said appeal be dismissed with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Ap-

peals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

Wm. J. Armstrong, Clerk of the Court of Appeals of the State of New York.

[fol. d] Court of Appeals, Clerk's Office, Albany

May 15, 1926.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

Wm. J. Armstrong, Clerk. (Seal.)

[fol. 1] In Supreme Court of New York

County Clerk's No. 7582—1911

Henry W. McMaster and Francis H. Skelding, as Receiver, of the Wabash Pittsburgh Terminal Railway Company, Plaintiffs,

against

George J. Gould, Joseph Ramsey, Jr., Myron T. Herrick, and James Hazen Hyde, Defendants

Notice of Appeal to Appellate Division

Sirs:

Please take notice that the plaintiffs herein hereby appeal to the Appellate Division of the Supreme Court, First Department, from the resettled order entered herein in the office of the Clerk of the County of New York on the 16th day of November, 1925, denying a motion made by the plaintiffs to substitute Kingdon Gould and Schuyler Nielson

Rice as executors of the estate of George J. Gould, deceased, as parties defendant in this action in the place and stead of George J. Gould, deceased, and reviving this action against said executors of the estate of said George J. Gould, deceased, without prejudice to the previous rights of the [fol. 2] plaintiffs herein under Chapter 253 of the Laws of 1925, and granting the cross-motion made by Kingdon Gould and Schuyler Nielson Rice as executors of the estate of George J. Gould, deceased, for an order vacating and setting aside the service of the order to show cause herein dated October 9, 1925, and vacating and setting aside said resettled order to show cause and from each and every part of said order entered as aforesaid on the 16th day of November, 1925.

Dated, New York, November 18, 1925.

Yours, etc., Larkin & Perry, Attorneys for Plaintiffs, 80 Broadway, Borough of Manhattan, New York City. Louis Marshall, Esq., of Counsel for Plaintiffs, 120 Broadway, New York City.

To Messrs. Chadbourne, Stanchfield & Levy, 120 Broadway, New York City; Messrs. Gillespie & O'Connor, 20 Vesey Street, New York City, Attorneys for Kingdon Gould and Schuyler Nielson Rice, as Executors of the Estate of George J. Gould, deceased, appearing specially, etc.; the Clerk of the County of New York.

[fol. 3] IN SUPREME COURT OF NEW YORK

[Title omitted]

RESETTLED ORDER APPEALED FROM—November 16, 1925

Upon reading and filing the affidavit of James Marshall, duly affirmed November 6th, 1925, and the notice for resettlement dated November 6th, 1925, it is

Ordered, that the order entered on November 2nd, 1925, herein, be and the same hereby is resettled so as to read as follows:

[fol. 4] At a Special Term, Part 1, of the Supreme Court of the State of New York, held in and for the County of New York, at the County Court House therein on the 2nd day of November, 1925

Present: Hon. Joseph M. Proskauer, Justice.

[Title omitted]

The plaintiffs having made a motion for an order substituting Kingdon Gould and Schuyler Nielson Rice, as Executors of the Estate of George J. Gould, deceased, as parties defendant in this action in the place and stead of said George J. Gould, deceased, without prejudice to the previous rights of the plaintiffs herein, and reviving this action as against said Executors of the Estate of George J. Gould, deceased, without prejudice to the previous rights of the plaintiffs herein, and said Kingdon Gould and Schuyler Nielson Rice, each as executors of the Estate of George J. Gould, deceased, having appeared specially herein and who expressly reserved their objections [fol. 5] to the jurisdiction of the court over them as such executors, having moved for an order vacating and setting aside the service of the order to show cause herein, dated October 9, 1925, and for an order vacating and setting aside said orders to show cause on the ground that this court has no jurisdiction over said Kingdon Gould and Schuyler Nielson Rice, or either of them, as executors of the estate of said deceased, and after hearing James Marshall, Esq., of counsel for the plaintiffs herein, and William Wallace, Jr., Esq., of counsel for said Kingdon Gould and Schuyler Nielson Rice, as Executors of the Estate of George J. Gould, deceased, appearing specially and solely for the purposes of said motions, and due deliberation having been had thereon.

Now, upon reading the summons and complaint and the amended answers herein and upon the proceedings heretofore had and upon the order to show cause signed by Mr. Justice Proskauer, dated October 9, 1925, and the affidavit of Raphael Brill, verified October 29, 1925, and the affidavit of James Marshall, duly affirmed October 25, 1925, in support of plaintiff's motion, and the affidavit of Kingdon Gould, verified October 23, 1925, the affidavit of Schuyler

Nielson Rice, verified October 23, 1925, the affidavit of George W. C. McCarter, verified October 23, 1925, and the affidavit of William Wallace, Jr. verified October 24, 1925, in opposition to plaintiffs' motion, and upon the notice of cross-motion of said Kingdon Gould and Schuyler Nielson Rice, as executors of the estate of George J. Gould, deceased, dated October 24, 1925, and the affidavit of Kingdon Gould, verified October 23, 1925, and the affidavit of Schuy- [fol. 6] ler Nielson Rice, verified October 23, 1925, the affidavit of George W. C. McCarter, verified October 23, 1925, and the affidavit of William Wallace, Jr., in support of said cross-motion, and the affidavit of Raphael Brill, verified October 29, 1925, and the affidavit of James Marshall, duly affirmed October 29, 1925, and the summons and complaint and amended answers herein, in opposition to said cross-motion, and on motion of Messrs. Chadbourne, Stanchfield & Levy and Gillespie & O'Connor, appearing specially and solely as attorneys for Kingdon Gould and Schuyler Nielson Rice as executors for the purpose aforesaid, it is

Ordered, that the motion made by the plaintiffs for an order substituting Kingdon Gould and Schuyler Nielson Rice, as executors of the estate of George J. Gould, deceased, as parties defendant in this action in the place and stead of said George J. Gould, deceased, without prejudice to the previous rights of the plaintiffs herein and reviving this action as against said executors of the estate of George J. Gould, deceased, without prejudice to the previous rights of the plaintiffs herein, be and the same hereby is denied upon the sole ground that Chapter 253 of the Laws of 1925, upon the authority of which this proceeding was brought, is unconstitutional and null and void in that the constitutional requirement of the 14th Amendment to the Constitution of the United States of due process of law precludes the legislature from providing generally for continuing actions for judgments in personam against foreign executors or administrators of deceased defendants; and it is further

Ordered, that the cross-motion made by Kingdon Gould [fol. 7] and Schuyler Nielson Rice, as executors of the estate of George J. Gould, deceased, for an order vacating and setting aside the service of said order to show cause dated October 9, 1925, and vacating and setting aside the said order, be and the same hereby is granted upon the sole

ground that Chapter 253 of the Laws of 1925, upon the authority of which this proceeding was brought, is unconstitutional and null and void in that the constitutional requirement of the 14th Amendment to the Constitution of the United States of due process of law precludes the legislature from providing generally for continuing actions for judgments in personam against foreign executors or administrators of deceased defendants.

Enter,

J. M. P., Justice of the Supreme Court of the State of New York.

[fol. 8] IN SUPREME COURT OF NEW YORK

[Title omitted]

ORDER TO SHOW CAUSE

On the annexed affidavits of Raphael Brill and James Marshall, respectively verified October 8th, 1925, and upon the summons, complaint and amended answers, and upon all the proceedings heretofore and herein, now on motion of Louis Marshall, Esq., counsel for the plaintiffs,

Let Kingdon Gould and Schuyler Nielson Rice, as Executors of the Estate of George J. Gould, deceased, show cause at Special Term, Part I, of this court, held in and for the County of New York, at the County Court House therein on the 23rd day of October, 1925, or as soon thereafter as counsel can be heard, why an order should not be granted substituting them as such executors and the estate of said George J. Gould, deceased, in his place and stead in this action, and why they should not be brought in as de-
[fol. 9] fendants herein without prejudice to the previous rights of the plaintiffs herein, and why this action should not be revived as against said executors and the estate of said George J. Gould, deceased, without prejudice to the previous rights of the plaintiffs herein; and it is

Ordered, that service of a copy of this order and said affidavits of Raphael Brill and James Marshall, may be made upon said executors personally or by mailing of a

copy of the same to Kingdon Gould at 160 East 72nd Street and 165 Broadway, Borough of Manhattan, New York City, and to Schuyler Nielson Rice at 17 Adelaide Avenue, Highland Park, New Brunswick, New Jersey, and 165 Broadway, Borough of Manhattan, New York City, and to Messrs. Chadbourne, Babbitt & Wallace or Messrs. Chadbourne, Stanchfield & Levy, at No. 120 Broadway, Borough of Manhattan, New York City, on or before October 17th, 1925.

Dated, New York, October 9th, 1925.

Joseph M. Proskauer, Justice of the Supreme Court of The State of New York.

[fol. 10] IN SUPREME COURT OF NEW YORK

[Title omitted]

AFFIDAVIT OF RAPHAEL BRILL

State of New York, County of New York, ss:

Raphael Brill, being duly sworn, deposes and says:

I am Managing Attorney in the office of Louis Marshall, Esq., trial counsel in the above entitled action, and am familiar with the course of this litigation. The action was commenced by the service of a summons and complaint on or about September 26th, 1910. Issue was finally joined as to the defendant George J. Gould by service of an amended answer, on or about March 24th, 1914. This action is brought by the plaintiffs, as Receivers of The Wabash Pittsburgh Terminal Railway Company against the defendants, as Managers of the Pittsburgh Toledo [fol. 11] Syndicate, organized about 1901, for the purpose of building or acquiring certain railways in Pennsylvania, West Virginia and Ohio, and constructing a terminal in Pittsburgh, Pennsylvania, which railways were finally consolidated by the Syndicate about 1901 into The Wabash Pittsburgh Terminal Railway Company. The suit was brought for the purpose of requiring an accounting from the defendants of funds received by said Syndicate Managers for the use of the Wabash Pittsburgh Terminal Rail-

way Company, and which plaintiffs claim were not devoted to the use to which they were intended. The court is respectfully referred to the complaint and pleadings herein, which are among the filed papers. The first amended answer of George J. Gould sets up the history of the transactions, as alleged by him, the defense of account stated, the defense of estoppel and the defense of non-rejoinder and necessary parties defendant. In October, 1920, a further amended answer was put in, by permission of the court, setting up the statute of limitations.

The trial of this action was commenced before Mr. Justice Finch in Special Term, Part IV of this court, on November 24th, 1920. The trial was adjourned from that day to November 29th, 1920, when it was continued on November 29th, November 30th, December 1st and Decemer 2nd, 1920. The case was then adjourned so that briefs might be submitted on the questions which arose and so that certain accounts submitted by the defendants might be surcharged by the plaintiffs. The trial was not resumed again until May 8th, 1922; in the interim however the afternoons of February 23rd, 25th, March 1st, 4th, 15th, 16th and 28th, 1921, were consumed in taking the deposition of Alvin W. [fol. 12] Krech one of the witnesses and Secretary of the Pittsburgh Toledo Syndicate. The trial continued before Mr. Justice Finch on May 8th, 9th, 10th and 11th, 1922, when it was adjourned so that the defendants might take a deposition, it being contemplated that a date would be fixed for submission of briefs and summing up.

In all 1464 pages of testimony were taken at this trial and about one hundred exhibits put in evidence. Before the case was submitted, Mr. Justice Finch was assigned to the Appellate Division of the Supreme Court.

Thereafter negotiations were entered into between counsel for plaintiffs and counsel for defendants for the purpose of retrying the action or submitting the case to another Judge of this court, but no arrangement has as yet been reached.

On information and belief, defendant George J. Gould died on or about May 16th, 1923, and at the time of his death he was a resident of Lakewood, State of New Jersey.

On information and belief, that on or about June 4th, 1923, the will of defendant, George J. Gould, was admitted

to probate in the County of Ocean, New Jersey, and letters testamentary were issued to his son, Kingdon Gould, and to one Schuyler Nielson Rice.

At the trial of the above entitled action, George J. Gould was on the witness stand November 40th, 1920, May 9th, 10th and 11th, 1922, and a total of 128 pages of his testimony was taken.

I am informed and believe that no ancillary letters testamentary or of administration have been issued on the estate of the defendant George J. Gould in this State. I am informed and believe that Kingdon Gould resides at 160 East [fol. 13] 72nd Street, Borough of Manhattan, New York City, and has a place of business at No. 165 Broadway, Borough of Manhattan, New York City, and that Schuyler Nielson Rice resides at 17 Adelside Avenue, Highland Park, New Brunswick, New Jersey, and has a place of business at No. 165 Broadway, Borough of Manhattan, New York City, and they have a place of business at 165 Broadway, Borough of Manhattan, New York City, for the transaction of business of the estate of George J. Gould, deceased.

The attorneys for the defendant, George J. Gould, are Messrs. Chadbourne, Babbitt & Wallace, 14 Wall Street, Borough of Manhattan, New York City.

I am informed by notice from Messrs, Chadbourne, Babbitt & Wallace and verily believe, that this firm is now doing business under the name of Chadbourne, Stanchfield & Levy, at No. 120 Broadway, Borough of Manhattan, New York City.

Wherefore, plaintiffs request that an order issue out of this court directing the said executors of the Estate of George J. Gould to show cause why they and the estate of said George J. Gould should not be substituted in his place and stead and why they should not be brought in as defendants herein without prejudice to the previous rights of the plaintiffs herein and why this action should not be revived as against the executors of the estate of said George J. Gould, deceased, without prejudice to the previous rights of the plaintiffs herein; and that service of a copy of this affidavit and the affidavit of James Marshall, and said order to show cause be made herein upon said executors person- [fol. 14] ally or by mailing the same to Kingdon Gould at

160 East 72nd Streeet and 165 Broadway, Borough of Manhattan, New York City, and to Schuyler Nielson Rice at 17 Adelaide Avenue, Highland Park, New Brunswick, New Jersey, and 165 Broadway, Borough of Manhattan, New York City, and to both the executors of George J. Gould at No. 15 Exchange Place, Jersey City, New Jersey and to Messrs. Chadbourne, Babbitt & Wallace or Messrs Chadbourne, Stanchfield & Levy, at No. 120 Broadway, Borough of Manhattan, New York City.

No previous application has been made to any court or Judge for the relief herein sought except that on December 24, 1923, an order to show cause similar to the one herein sought was granted by Mr. Justice Burr; that thereafter by order granted by Mr. Justice Guy dated, February 13, 1924, this action was revived against the executors of George J. Gould, deceased, and those executors were made parties defendant; that on October 10, 1924, the Appellate Division reversed the order granted by Mr. Justice Guy and certified to the Court of Appeals the following questions:

"(1) Did the court at Special Term have power to substitute the executors of the last Will and Testament of George J. Gould, deceased, appointed by the Orphans' Court of New Jersey where his will was probated, as parties defendant herein without their consent, in place of their testator, pursuant to the proceedings instituted by the plaintiffs herein for that purpose, and to revive as against the executors of this action, which at the time of testator's death was pending in the Supreme Court of this State?"

[fol. 15] Subsequently the Court of Appeals affirmed the order of the Appellate Division. Thereafter the Legislature by Chapter 253 of the Laws of 1925, adopted an amendment to Section 160 of the Decedent Estate Law by adding a subdivision thereto, reading as follows:

"(2. An action or proceeding pending in any court of this State in which the court shall have obtained jurisdiction of the person of a defendant or respondent who is domiciled in any other State, territory or district of the United States or in any foreign country shall, if the cause of action survives, not abate by reason of the death of such defendant or respondent, but his executor or administrator duly appointed in such state, territory or district of the

United States or foreign country, shall, upon the application of the adverse party, and upon such notice as the court may prescribe, be brought in and substituted in the place of the decedent and the action or proceeding shall continue."

A reargument was granted by the Court of Appeals after the passage of this statute but the court reaffirmed its original holding on the ground that the question having come before it upon a certified question it was bound to answer the same as of the time that the question was certified and that it could not consider the Act of 1925. It did, by dictum, however, suggest that the statute was unconstitutional.

In said previous application it was urged by the executors of George J. Gould, deceased, who appeared specially for the purpose of opposing the revival of the action as [fol. 16] against them and their substitution as parties defendant, that neither under Section 160 of the Decedent Estate Law as it existed prior to the amendment of 1925, nor under said section as it existed after amendment by Chapter 253 of the laws of 1925, were the plaintiffs entitled to the relief asked. The executors particularly opposed the proceeding on the grounds that:

"Such proceeding contravenes the Constitution of the United States in respect, among others, as follows: it seeks, without due process of law, to compel said executors, citizens and officials of New Jersey, to submit to the jurisdiction and control of the laws of the State of New York and the courts thereof in an action not in rem; also it would contravene that provision of the Constitution of the United States; requiring each state to give full faith and credit to the public acts records and jurisdictional proceedings of every other state, in that it would be a refusal by the State of New York to give credit to the decree admitting said will to probate and the act of the courts of New Jersey in issuing letters of testamentary thereunder to said executors and the other acts of the courts of New Jersey with respect to publication of notice to the creditors of said state and barring all persons who had presented claims under said notice from proceeding against the executors or the estate in administration, and otherwise.

Chapter 253 of the Laws of 1925, of the State of New York (amending Section 160 of the Decedent Estate Law) contravenes the Constitution of the United States so far

as it represents an attempt to authorize the courts of New York to push the effect of their judgments or decrees [fol. 17] across the borders of New Jersey to the subversion of the policies of New Jersey; and so far as it involves an attempt to fix upon such executors, against their will, a status independent of the laws of the sovereignty from which they hold their executorial powers."

It was contended on the other hand by the plaintiffs that they were entitled to the revival of the action and the substitution of the executors of George J. Gould, deceased, as parties defendant under the statute as it stood prior to the Amendment of 1925, and upon the reargument in the Court of Appeals they urged that they were entitled to the relief under the Amendment of 1925, to Section 160 of the Decedent Estate Law, and they insisted and do not insist that Section 160 of the Decedent Estate Law, in its original and amended forms were and are not constitutional either under the due process clause or the full faith and credit clause of the Constitution of the United States.

This application is made to revive the action and substitute the executors of George J. Gould under the authority of and pursuant to Section 160 of the Decedent Estate Law as amended by Chapter 253 of the Laws of 1925.

Raphael Brill.

Sworn to before me this 8th day of October, 1925.
Simon Gross, Notary Public. Bronx Co. No. 65, Bronx Co. Reg. No. 2658. Cert. filed in New York Co. No. 340. New York County Reg. No. 6311. Commission expires March 30, 1926.

[fol. 18] IN SUPREME COURT OF NEW YORK

[Title omitted]

AFFIDAVIT OF JAMES MARSHALL

STATE OF NEW YORK,
County of New York, ss:

James Marshall, being duly affirmed, deposes and says:

I am an attorney at law and was associate counsel to Louis Marshall, Esq., on the trial of this action before Mr. Justice Finch in this court. The action was brought by the

Receivers of The Wabash Pittsburgh Terminal Railway Company against the defendants as Managers and Trustees of the Pittsburgh and Toledo Syndicate. This Syndicate was organized in the year 1901 for the purpose of constructing a railroad, with a terminal at Pittsburgh, and connecting with the Wabash Railroad.

[fol. 19] In 1904, after the railroad was nearly completed by the Syndicate, The Pittsburgh Terminal Railway Company was organized to take over the constituent roads which had been incorporated in the States of Ohio, Pennsylvania and West Virginia. The Syndicate Managers, on May 9th, 1904, made a proposition to The Pittsburgh Terminal Railway Company, which may be summarized as follows:

The Syndicate offered:

1. To assign and transfer 8,475 shares of the First Preferred Stock, 64,238 shares of the Second Preferred Stock and 118,700 shares of the Common Stock of The Wheeling and Lake Erie Railroad Company, constituting a majority of the issued and outstanding capital stock of the Company;

2. To assign and transfer a contract with the Carnegie Steel Company and the Union Railroad;

3. To secure the extension to June 1st, 1954, of the Traffic and Trackage Contract, and to secure a Supplemental Agreement on the part of the Wabash Railroad Company and The Wheeling and Lake Erie Railroad Company under which these Companies were to pledge twenty-five per cent. of their earnings over certain of their lines to meet any deficiencies of income of The Wabash Pittsburgh Terminal Railway Company second mortgage bonds;

4. To call the unpaid portion of the syndicate subscription and pay over the same to the Terminal Company;

5. To deliver an agreement of the Wabash Railroad Company to purchase $6,600,000 First Mortgage Bonds of the Terminal Company for $6,000,000;

[fol. 20] 6. To discharge and release the Terminal Company from the indebtedness owing by it to the Syndicate for advances made to the Terminal Company and its predecessors;

7. To release all claims and demands on the part of the Syndicate against the Terminal Company.

In consideration the Terminal Company was to create a funded debt of $50,000,000 First Mortgage Four Per Cent. Bonds, and $20,000,000 Second Mortgage Bonds, and to increase its capital stock $6,000,000. Of the First Mortgage Bonds $13,400,000 were to be delivered to the Syndicate, and $6,600,000 to the Wabash Railroad Company. The remaining First Mortgage Bonds were to be used for construction and improvements in Pittsburgh, and the Pittsburgh district, and $25,000,000 was to be issued under certain restrictions. The entire Second Mortgage Bonds and $6,000,000 of capital stock were to be delivered to the Syndicate. The Syndicate already held $4,000,000 of capital stock which had been exchanged for the capital stock of the merged Companies.

This proposition was accepted by the board of directors of The Wabash Pittsburgh Terminal Railway Company on May 9th, 1904, at a special meeting of the board of directors of the Company.

At that time, or shortly thereafter, defendant George J. Gould, who was already Chairman of the Syndicate Managers, became Chairman of the board of directors of the Terminal Railway Company. The Interstate Commerce Commission, Investigation No. 8663, states:

"The record clearly indicates that George J. Gould was [fol. 21] the dominating factor in the management of the Wabash, the Terminal, and the Wheeling."

The Terminal Company issued its bonds and stock pursuant to its agreement. The Syndicate received from the Wabash Railroad Company $6,000,000 for the $6,600,000 of First Mortgage Bonds of the Terminal Company, and approximately $7,000,000 in unpaid subscriptions to the Syndicate. It is contended that the only payments made by the Syndicate Managers out of these funds to the Terminal Company were about $3,600,000.

The judgment demanded is:

"That the defendants herein account to the plaintiffs herein for all transactions had by these defendants, or any of them, or by the Syndicate or its managers, as agents or trustees of the Terminal Company, and especially for the

disposition of any moneys received or held by them or any of them as agents or trustees of the Terminal Company, or for the account of the Terminal Company;

And that upon the completion of such accounting the defendants and each of them be decreed to pay over to the plaintiffs herein such sums as shall be ascertained to be due from them or any of them, or from the said syndicate, to the plaintiffs herein;

And that the plaintiffs herein have their costs and disbursements in this action;

And that the plaintiffs herein have such other and further relief as may be just."

The Court is respectfully referred to the pleadings herein and to the Syndicate Agreement herein mentioned, which [fol. 22] are made a part hereof as if set forth in full.

The trial of this action proceeded before Mr. Justice Finch at Special Term, Part IV of this court, in November and December, 1920, and in May, 1922, several days in the meantime being spent in the taking of the deposition of Alvin W. Krech, Secretary of the Pittsburgh and Toledo Syndicate. In all 1464 pages of testimony were taken and about 100 exhibits were put in evidence. The giving of the testimony was completed with the exception of that of one witness whom the defendants expressed their intention of calling, but who was prevented at the time from testifying because of illness and the trial was postponed solely for the purpose of enabling the defendant to examine this witness. The taking of his testimony was delayed by defendants' attorney and before the case was finally submitted, Mr. Justice Finch was assigned to the Appellate Division of the Supreme Court, and thereby became disqualified from rendering a decision in this case and the proceeding before him resulted in a mistrial. Several attempts have been made since that time to bring the case on for retrial before another Justice of the Supreme Court but the same was not accomplished before the death of the defendant Gould.

The accounts of the Pittsburgh and Toledo Syndicate were maintained in the books of the Mercantile Trust Company of this city. The following items were surcharged by the plaintiffs on the trial:

(a) Total amount paid out for the acquisition of the stock of The Wheeling and Lake Erie Railroad Company, turned over to the Terminal Company under the offer of [fol. 23] May 9th, 1904, above referred to, $4,469,782.26.

As to this item the plaintiffs contend that the agreement called for the assignment and transfer to the Terminal Company of the stock, without any charge being made for the same against the Terminal Company, or against the unpaid Syndicate subscriptions, and the proceeds of the $6,600,000 First Mortgage Terminal Company Bonds which were collected by the Syndicate Managers.

(b) Paid to Washington E. Connor, ostensibly as commission on the acquisition of The Wheeling and Lake Erie Railroad Company stock, $1,000,000.

As to this item plaintiffs contend not only that the commission is excessive but that it was paid in bad faith and split among the Syndicate Managers, and plaintiffs believe that they have shown on the trial that as a matter of fact George J. Gould received as his share of this $1,000,000 commission the sum of $102,000 which, on April 4th, 1901, was transferred on the books of the Mercantile Trust Company from the $1,000,000 commission credited to Connor, to the account of George J. Gould on the Mercantile Trust Company's books.

(c) Interest due and paid to the Mercantile Trust Company for moneys advanced to the Syndicate by it in excess of the amounts paid in on Syndicate subscriptions, $1,017,429.78.

As to this item plaintiffs claim that the Syndicate had no right to borrow moneys while there were uncollected Syndicate subscriptions outstanding which should have been devoted to the benefit of the enterprise instead of paying such large sums of interest. It was shown on the trial of this action that the loans of the Mercantile Trust Com- [fol. 24] pany were participated in by George J. Gould, some of his brothers, and by the estate of his father, Jay Gould, so that they received a share of this interest item.

(d) Item appearing on the Mercantile Trust Company books as having been sent to Pittsburgh, July 31, 1901, the only explanation being "understood by Mr. Gould," $160,000.

There has never been any explanation of this item.

On the trial, Mr. Gould testified on this question:

"Q. Yes, I know, but you have not anything to indicate what the money was used for?

A. No.

By the Court:

Q. And the request of General Fitzgerald did not indicate in any way what the money was to be used for?

A. No, sir" (pp. 881, 882).

George J. Gould on the trial of this action testified on November 30, 1920, on May 9, 10 and 11, 1922; a total of 128 pages of his testimony was taken.

In the course of his testimony George J. Gould stated as follows:

"Direct examination by Mr. Brackett:

"Q. I want to interrogate you a moment with respect to the offices which you maintained, first at No. 195 Broadway and later on at No. 165 Broadway. Do you know about what time the change was made from 195 Broadway to 165 Broadway?

[fol. 25] A. I think it was in 1910. It was about that time.

Q. It was certainly following the sale of the Western Union stock, was it not?

A. Yes, sir. That might have been in 1911.

Q. Was the occupation of No. 165 Broadway—did that begin immediately after the surrender of 195 Broadway?

A. It did.

Q. So that the occupation of the two offices together was continuous?

A. Yes, sir.

Q. And how many years have you thus had an office in the City of New York?

A. How many years?

Q. Yes. Well, over 25 years, have you not?

A. Oh, 35 years.

Q. And that has been continuous?

A. Yes, sir.

Q. And open and notorious, has it not?

A. Yes, sir.

Q. Where you transacted business in person?

A. Yes, sir.

Q. And, with the exception of such absences as any man takes from his business offices, were you there continuously during business hours?

A. That is so.

Q. For the transaction of business in person?

A. Yes, sir.

Q. Where is your home, Mr. Gould?

A. My home is at Lakewood, New Jersey.

Q. And has been how long?

A. Since 1893—the year after my father's death.

* * * * * * *

Q. That has been your residence and domicile?

A. Yes, sir.

Q. Continuously?

A. Yes, sir, continuously.

Q. Coming over here to attend to your business at the [fol. 26] offices you have mentioned?

A. Yes, sir.

Q. And your house at Lakewood, your home, or residence, or domicile, at Lakewood, has been continuously kept open for the family and personal occupation?

A. Yes, sir, it is summer and winter.

Q. At all seasons of the year?

A. Yes, sir.

Q. In addition to that you have had a house on Fifth Avenue, in the City of New York?

A. The house in New York belonged to Mrs. Gould.

Q. But there were times—I do not mean regular times—there were times or seasons that that was occupied by your family?

A. Certainly.

Q. And yourself?

A. Yes, sir.

Q. And occasionally and perhaps often while you were here attending to business, you spent the night at the residence on Fifth Avenue?

A. Yes, sir—in the winter time particularly." (Record, pp. 1038 to 1040.)

I am informed and believe that in an action in this court entitled "George J. Gould, et al., as Executors and Trustees against George J. Gould, et al.," the executors of said George J. Gould, towit: Schuyler Nielson Rice and Kingdon Gould, have admitted that at the time of his death said George J. Gould owned "a hunting lodge known as Furlough Lodge," the same being a piece of real estate in the Catskill Mountains and that in addition thereto, they admit that there were other assets of the said George J. Gould within this State at the time of his death, including certain income impounded by the Trustees under the Last Will and Testament of Jay Gould, deceased, which [fol. 27] amounts to approximately $1,400,000, and also a seat on the New York Stock Exchange, which was the property of said George J. Gould.

I am further informed and believe that the Trustees under the Last Will and Testament of Jay Gould, deceased, commenced to impound within this State the income of said George J. Gould in or about the month of December, 1920.

On information and belief, Kingdon Gould has a residence at No. 160 East 72nd Street, New York City, and for many years past has had his office in the same suite with George J. Gould, his father, at No. 165 Broadway, Borough of Manhattan, New York City, and now has an office at the same address.

On information and belief, Schuyler Nielson Rice was for many years employed in the office of the trust estate created under the Last Will and Testament of Jay Gould, deceased, and was for many years secretary of said estate, and that for many years he acted in a private secretarial capacity to defendant George J. Gould and made his office at 165 Broadway, Borough of Manhattan, New York City.

On information and belief, said executors maintain an office at 165 Broadway, Borough of Manhattan, New York City, for the transaction of business of the estate of George J. Gould, deceased.

The Pittsburgh and Toledo Syndicate was organized in New York, and transacted all its business here through the Mercantile Trust Company which, prior to destruction by fire, was located at No. 120 Broadway, Borough of Manhattan, New York City.

The transactions complained of and as to which an accounting is demanded, all occurred in the City of New York. [fol. 28] The defendant Herrick is a resident of the State of Ohio. The defendant Ramsay died some time ago, and I am informed and believe was a resident of Pennsylvania at the time of his death; the defendant Hyde was never served with process herein, and this action has not been prosecuted against these two.

The attorneys for George J. Gould on the trial of this action were Messrs. Chadbourne, Babbitt & Wallace of this city. William Wallace, Jr., Esq., of said firm took an active part in the trial of the case. I am informed and believe that the firm of Chadbourne, Babbitt & Wallace has been combined with the firm of Stanchfield & Levy, in which firm the late John B. Stanchfield and the late Senator Edgar T. Brackett, both of whom represented the defendant Gould in this action, were partners, and that the address of the new firm is 120 Broadway, Borough of Manhattan, New York City.

James Marshall.

Affirmed before me this 8th day of October, 1925. Simon Gross, Notary Public, Bronx Co., No. 65. Bronx Co. Reg. No. 2658. Cert. filed in New York Co. No. 340. New York County Reg. No. 6311. Commission expires March 20, 1926.

[fol. 29] In Supreme Court of New York

[Title omitted]

Affidavit of Abraham Gold Verified October 15, 1925

State and County of New York, ss:

Abraham Gold, being duly sworn, deposes and says:

I am a clerk in the office of Louis Marshall, counsel for the plaintiffs herein, and reside in the Borough of Manhattan, City, County and State of New York.

On the 14th day of October, 1925, I served upon each of the undersigned a copy of the affidavit and order to show cause of which the annexed is the original by depositing

the same properly enclosed in a postpaid wrapper, in the post office box at No. 120 Broadway, Borough of Manhattan, City, County and State of New York, directed to each [fol. 30] of said persons at the addresses set opposite their respective names, that being the addresses designated in the said order to show cause between which places there was and now is a regular communication by mail:

Kingdon Gould, 160 East 72nd Street, Borough of Manhattan, New York City.

Kingdon Gould, 165 Broadway, Borough of Manhattan, New York City.

Schuyler Nielson Rice, 17 Adelaide Avenue, Highland Park, New Brunswick, New Jersey.

Schuyler Nielson Rice, 165 Broadway, Borough of Manhattan, New York City.

Abraham Gold.

Sworn to before me this 15th day of October, 1925. Raphael Brill, Notary Public. New York County No. 328. New York Register's No. 6017. Commission expires Mar. 30, 1926.

[fol. 31] In Supreme Court of New York

[Title omitted]

Affidavit of Abraham Gold Verified October 16, 1925

State of New York,
County of New York, ss:

Abraham Gold, being duly sworn, deposes and says:

I am a clerk in the office of the counel for the plaintiffs herein.

On October 16, 1925, I served the annexed affidavits and order to show cause upon Messrs. Chadbourne, Stanchfield & Levy at 120 Broadway, New York City, by delivering to and leaving a copy of the same with William Wallace, Jr., a member of said firm.

I knew the person so served to be William Wallace, Jr., a member of the firm of Chadbourne, Stanchfield & Levy,

[fol. 32] the attorneys designated in the order to show cause of Mr. Justice Proskauer dated October 9, 1925.

Abraham Gold.

Sworn to before me this 16th day of October, 1925. Raphael Brill, Notary Public. New York County No. 328. New York Register's No. 6017. Commission expires Mar. 30, 1926.

[fol. 32a] In Supreme Court of New York

[Title omitted]

Summons

To the above named Defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiffs' attorneys within twenty days after the service of this summons exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you, by default, for the relief demanded in the complaint.

Dated, New York, September 16th, 1910.

Joline, Larkin & Rathbone, Plaintiffs' Attorneys, Office and Post-Office Address, No. 54 Wall Street, Borough of Manhattan, New York City.

[fol. 32b] In Supreme Court of New York

[Title omitted]

Complaint

The plaintiffs, by Joline, Larkin and Rathbone, their attorneys, for their complaint in the above-entitled action respectfully show and allege as follows:

First. That The Wabash Pittsburgh Terminal Railway Company, hereinafter caller the Terminal Company, is and since on or about May 7th, 1904, has been a consolidated

corporation, duly organized, created and existing under and by virtue of the laws of the States of Pennsylvania, West Virginia and Ohio, and having its principal office in the City of Pittsburgh, in the Western District of Pennsylvania, and that upon May 29th, 1908, in an action brought in the Circuit Court of the United States for the Western District of Pennsylvania in which The Wabash Railroad Company was complainant and the Terminal Company was defendant, the plaintiffs herein were, after due appearance [fol. 32c] of the defendant, duly appointed by said court as receivers of the said Terminal Company, and of all its property, assets, rights and franchises and they as said receivers duly qualified and accepted said trust and have been and now are the duly appointed, qualified and acting receivers of the Terminal Company; and that on the 13th day of September, 1910, an order of the Circuit Court of the United States for the Western District of Pennsylvania was made and filed granting to the plaintiffs herein permission to institute and maintain this action as receivers of the Terminal Company.

Second. That during the year 1901, a certain agreement in writing was entered into by the defendants George J. Gould and Joseph Ramsey, Jr., and Louis Fitzgerald, now deceased, and others, whereby was formed and created a certain syndicate called the Pittsburgh-Toledo Syndicate and hereafter referred to as the Syndicate, a copy of which agreement is hereto annexed, marked Exhibit "A-1," and hereby made a part hereof; and that thereafter a certain supplemental and amendatory agreement, dated April 8th, 1901, was entered into by the defendants George J. Gould, Joseph Ramsey, Jr., and others, a copy of which supplemental and amendatory agreement is hereto annexed, marked Exhibit "A-2," and hereby made a part hereof; and that the defendants herein, and each of them, are and have been since the year 1901, members of and subscribers to said Syndicate; and that the defendants George J. Gould, Joseph Ramsey, Jr., Myron T. Herrick and James Hazen Hyde, and each of them, have since May, 1901, been and acted as, Syndicate Managers of said Syndicate.

Third. That on or about April 11th, 1904, the defendants herein and other members of and subscribers to the [fol. 32d] Syndicate approved and accepted a certain plan

in writing for financing the syndicate, a copy of which is hereto annexed and marked Exhibit "B," and hereby made a part hereof.

Fourth. That thereafter and on or about May 7th, 1904, and pursuant to said plan, the Syndicate and its managers caused the creation of the Terminal Company and caused to be chosen and elected such directors and officers of said company as they deemed best and in all things dominated and controlled the action of said company.

Fifth. That thereafter and on or about May 9th, 1904, the Syndicate and the defendants as managers thereof caused to be submitted to the directors of the Terminal Company at a special meeting of the board of directors of said company, the following offer or communication:

"New York City, May 9, 1904.

To the Board of Directors of The Wabash-Pittsburgh Terminal Railway Company.

Dear Sirs:

By direction of the Syndicate Managers of the Pittsburg-Toledo Syndicate, I communicate to you the following proposal of said Syndicate, namely:

The Syndicate proposes:

1. To sell, assign and transfer to your Company the following shares of the capital stock of The Wheeling and Lake Erie Railroad Company, constituting a majority of the issued and outstanding capital stock of that Company.

8,475 shares of the par value of one hundred dollars ($100) each of First Preferred Stock.

[fol. 32e] 64,238 shares of the par value of one hundred dollars ($100) each of Second Preferred Stock.

118,700 shares of the par value of one hundred dollars ($100) each of Common Stock.

2. To assign and transfer to your Company all of the right, title and interests of the Syndicate and its Managers in and to a certain contract dated February 4, 1901, executed by the Syndicate Managers of the Pittsburgh-Toledo Syndicate, the Union Railroad Company and the Carnegie Steel Company, a copy of which contract is transmitted to

you herewith, your Company to assume the conditions and obligations resting upon the Syndicate under said agreement.

3. To secure the extension to June 1, 1964, of the Traffic and Trackage Contract, dated October 10, 1902, between The Wabash Railroad Company, he Wheeling and Lake Erie Railroad Company and the Pittsburgh, Carnegie and Western Railroad Company (all of the rights and liabilities of said last-named Company under said contract having been assumed by your Company), and also to secure a supplemental agreement upon the part of The Wabash Railroad Company and The Wheeling and Lake Erie Railroad Company, under which The Wabash Railroad Company and The Wheeling and Lake Erie Railroad Company will pledge to your Company twenty-five (25) per cent of the gross earnings derived east of Chicago and St. Louis, from traffic interchanged with or passing over the road of your Company, up to an amount which may be required to meet any deficiences of income of your Company necessary to [fol. 32f] pay interests on its First and Second Mortgage Bonds hereinafter described.

4. To call the unpaid portion of the syndicate subscription of twenty million dollars ($20,000,000) and to pay over the same as received and upon the conditions hereinafter expressed to your Company, to be used and applied by it for the purposes hereinafter mentioned.

5. To deliver to your Company an agreement on the part of The Wabash Railroad Company to purchase six million six hundred thousand dollars ($6,600,000) of your Company's First Mortgage bonds, hereinafter described, and to pay therefor the sum of six million dollars ($6,000,000), which amount of money shall be received and applied by you in the manner hereinafter mentioned.

6. To discharge and release your Company from the indebtedness owing by it to the Syndicate, being the amount of money advanced from time to time by the Syndicate to your Company or its predecessors.

7. To release all claims and demands of whatever nature on the part of the Syndicate against your Company.

In consideration of the above, your Company shall create and issue and deliver to the Syndicate, or upon its order, in the manner hereinafter provided, the following described securities, and shall also perform the other terms and conditions hereinafter stated.

(a) First Mortgage Fifty-Year Four Per Cent. Gold Bonds, to be dated May 10, 1904, to mature June 1, 1954, [fol. 32g] and to have hereto attached coupons for interest at the rate of four per cent. (4%) per annum, the first coupon to be for one year's interest and to mature June 1, 1905, and thereafter interest to be payable semi-annually on the first days of June and December in each year; both principal and interest to be payable in gold coin and without deduction for taxes. The total authorized issue of said bonds to be limited to the aggregate principal amount of fifty million dollars ($50,000,000), and all of said bonds to be secured by a first mortgage to cover as a first and permanent lien of all the railroads, terminals, equipment and other property now owned by your Company and also all property purchased, acquired or constructed through the use of said bonds or their proceeds. The mortgage also to cover all the shares of the capital stock of The Wheeling and Lake Erie Railroad Company above described and to cover also, all the rights of your Company under the traffic and trackage contracts herein mentioned and described.

Thirteen million four hundred thousand dollars ($13,400,000) par value of these bonds to be issued to the Syndicate, or upon its order, immediately upon the execution of said mortgage and six million six hundred thousand dollars ($6,600,000) par value of said bonds to be issued and delivered in accordance with the agreement of purchase of The Wabash Railroad Company hereinbefore mentioned.

The balance of said bonds, to wit: Thirty million dollars ($30,000,000) par value thereof, to be reserved and to be issuable under suitable provisions of said first mortgage [fol. 32h] as follows:

1. For use from time to time as required to prosecute construction and improvements in Pittsburgh and the Pittsburgh district now in progress and according to existing plans, five million dollars ($5,000,000).

2. For new property, extensions, etc., under carefully guarded restrictions (including a covenant by your com-

pany not to issue more than $35,000,000 of said bonds in the aggregate until after the interest is being earned and regularly paid upon both first and second mortgage bonds) —twenty-five million dollars ($25,000,000).

(b) Second Mortgage Gold Bonds, to be dated May 10, 1904, to mature June 1, 1945, and to bear interest from June 1, 1904, at the rate of four per cent. per annum payable semi-annually on the first days of June and December of each year, such interest, however, to be payable for the period of six years from said June 1, 1904, only out of the net earnings and revenues of your Company, and thereafter to be payable absolutely upon said dates, both principal and interest of the bonds to be payable in gold coin and without deduction for taxes, the total authorized issue of said bonds to be the aggregate principal sum of twenty million dollars, and to be secured by a second mortgage subject to the first mortgage above mentioned upon all the railroad, property and franchises covered by said first mortgage and also all the stocks, contracts and rights under contracts embraced in said first mortgage.

All of these Second Mortgage Bonds to be issued to the Syndicate, or upon its order, immediately on the execution of said mortgage.

[fol. 32i] (c) One hundred and twenty thousand shares of the par value of fifty dollars each of the increased capital stock of your company, all of which increased stock to be issued and delivered to the Syndicate or upon its order.

The above securities and the mortages securing the same, as well as the corporate action taken by your Company in connection therewith and in carrying out the matters embraced in this proposal to be in form satisfactory to counsel for the Syndicate Managers.

The following are the additional terms and conditions above referred to, viz.:

That your Company shall make provision satisfactory to the Syndicate Managers and their counsel for the application of the moneys receivable by your Company upon the sale of first mortgage bonds to The Wabash Railroad Company and from the Syndicate subscriptions, as above, to the completion of the property of your Company and the payment of any indebtedness incurred by the Syndicate or by

your Company in connection with the construction of its railroad and the acquisition of its property and the expenses incident to the organization of your Company and the creation and issue of its securities.

An early reply to the foregoing proposal is requested.
Yours respectfully,
Alvin W. Krech, Secretary, Pittsburgh-Toledo Syndicate."

Sixth.—That on the said May 9th, 1904, and at a special meeting of the board of directors of the Terminal Company the offer or proposition of the Syndicate above set forth [fol. 32j] accepted by the said company and the following resolution was adopted by a unanimous vote of the entire board:

"Resolved, that the proposition of the Pittsburg-Toledo Syndicate, as made in the communication of its Secretary, dated May 9, 1904, and now submitted to this Board be and the same is hereby approved and accepted, subject to the consent and approval of the stockholders of this Company and the Secretary of this Company be and he is hereby authorized to communicate this action to the said Pittsburg-Toledo Syndicate.

"Further Resolved, That the proper officers of this Company be and they are hereby authorized under the direction of this Board to take any and all steps and proceedings which may be necessary to carry out the foregoing resolution."

And that on May 11th, 1904, at a meeting of the stockholders of the Terminal Company at which all stockholders of the company were present in person, the consent and approval of the stockholders to and of the approval and acceptance by the board of directors of the said offer of the Syndicate was manifested and given by unanimous vote.

Seventh.—That the Terminal Company in all respects fully complied with the offer or proposition of the Syndicate above set forth and did in all respects duly perform all of the terms and conditions of said offer.

Eighth.—That thereafter, and pursuant to the offer above set forth, $6,600,000 First Mortgage Fifty-Year Four Per

Cent. Gold Bonds of the Terminal Company were duly issued by the Terminal Company and delivered to The Wabash Railroad Company and that The Wabash Rail-[fol. 32k] road Company thereupon paid therefor to the defendants as managers of the aforesaid Syndicate and as the agents of and trustees for the Terminal Company the sum of $6,000,000 and a further sum representing the accrued interest on said bonds, the exact amount of such further sum being unknown to the plaintiffs; and that pursuant to the provisions of the offer above set forth and more particularly of its 4th numbered paragraph, the defendants, as managers of the aforesaid Syndicate, did call the unpaid portion of the Syndicate subscription and did receive in response to such call a sum of money the exact amount of which is unknown to the plaintiffs, but which, as the plaintiffs are informed and believe, was in excess of $6,700,000; and that such moneys were held by the defendants as managers of the aforesaid Syndicate, jointly and severally, as agents of and trustees for the Terminal Company and that they neglected to pay over as received any of the above mentioned moneys to the Terminal Company.

Ninth.—That the Syndicate and its managers, the defendants herein, and each of them, have refused and neglected and still refuse and neglect to pay over to the Terminal Company all such moneys so received by the defendants as managers of the aforesaid Syndicate and as the agents and trustees of the Terminal Company, and have refused and still refuse to render any account thereof, although said account has been duly demanded; but that there has been paid to the Terminal Company certain sums of money, amounting, as the plaintiffs are informed and believe, to not more than $3,800,000, purporting to be a part of the moneys due to the Terminal Company from said Syndicate and its managers as the agents and trustees of the Terminal Company; but that it is impossible to ascertain, [fol. 321] without an accounting from the defendants herein, what portion of the moneys due from the Syndicate and its managers to the Terminal Company, has been so paid over to the Terminal Company, or what portion is still due.

Wherefore plaintiffs demand judgment as follows: That the defendants herein account to the plaintiffs herein for all transactions had by these defendants, or any of them, or by

the Syndicate or its managers, as agents or trustees of the Terminal Company, and especially for the disposition of any moneys received or held by them or any of them as agents or trustees of the Terminal Company, or for the account of the Terminal Company;

And that upon the completion of such accounting the defendants and each of them be decreed to pay over to the plaintiffs herein such sums as shall be ascertained to be due from them or any of them, or from the said syndicate, to the plaintiffs herein;

And that the plaintiffs herein have their costs and disbursements in this action;

And that the plaintiffs herein have such other and further relief as may be just.

Joline, Larkin & Rathbone, Attorneys for Plaintiffs,
Office and Post-office address, 54 Wall Street,
Borough of Manhattan, New York City.

[fol. 32m] *Duly sworn to by Henry W. McMaster. Jurat omitted in printing.*

EXHIBIT A1 TO COMPLAINT

Agreement, dated this first day of February, A. D. 1901, by and between Louis Fitzgerald, of New York City, N. Y., George J. Gould, of New York City, N. Y., Joseph Ramsey, Jr., of St. Louis, Mo., hereinafter called the "Syndicate Managers," parties of the first part and the Syndicate Subscribers hereto, severally, parties of the second part, of whom each is hereinafter termed the "Syndicate Subscriber," and all of whom, together with the said Louis Fitzgerald, George J. Gould, and Joseph Ramsey, Jr., constitute the syndicate.

[fol. 32n] Whereas, it is proposed by Louis Fitzgerald, George J. Gould, and Joseph Ramsey, Jr., hereinafter designated as the Syndicate Managers, to complete certain negotiations now in progress for the construction or purchase, provided that they can do so on reasonable terms, of the following described railway property, to wit:

First.—A line of railway from Pittsburgh, Pa., through the states of Pennsylvania, West Virginia, and Ohio, to Toledo, Ohio, with branches to the cities of Cleveland,

Wheeling, and such other cities as the Syndicate may hereinafter determine.

Second.—Terminal and Belt Railway facilities at the Cities of Pittsburgh, Toledo, and Cleveland.

Third.—Such rolling stock and motor power equipment as may be necessary for the proper operation of said railway lines when completed.

Whereas: for the purpose of providing the necessary money for the construction or purchase, or both, of said properties for the purposes herein set forth, said Louis Fitzgerald, George J. Gould, and Joseph Ramsey, Jr., and the subscribers hereto, wish to form a syndicate to advance the necessary money to the amount of $15,000,000.00 for the construction or purchase of said property and for the other purposes herein set forth.

Now this agreement witnesseth: That in consideration of the premises, and of their mutual promises, the parties hereto and the Syndicate Subscribers severally agree with each other and the Syndicate Managers as follows:

[fol. 32o]

I

The parties hereto form a syndicate for the purpose of acquiring and purchasing said railroad properties hereinbefore described, on terms satisfactory to the Syndicate Managers and, having acquired the same, of improving, extending, merging, operating, controlling and disposing of the same as may be determined by the Syndicate Managers to be for the benefit of such Syndicate.

II

Each subscriber hereto and to any counterpart hereof, shall set opposite his name, the amount of his subscription to the Syndicate, and shall be called upon to pay and be liable only for such amount as shall bear, to the obligation of the Syndicate not exceeding $15,000,000.00, the same ratio or proportion as his subscription bears to said maximum obligation. In the event that more than the aggregate amount of $15,000,000.00 is subscribed, the Syndicate Managers may reduce any or all subscriptions hereto in such

amount in their discretion as shall make the aggregate subscription $15,000,000.00, and in case any such reductions shall be made, the Syndicate Managers shall notify the subscribers whose subscriptions have been reduced of the amount of such reductions. The funds of the syndicate shall be applied, used and disbursed by the Syndicate Managers for the purposes above set forth and such other purposes as may become necessary in carrying out the Syndicate plans.

[fol. 32p] III

The said Syndicate Managers agree to proceed with reasonable diligence to construct or purchase said railway properties and other properties hereinbefore mentioned at such prices and upon such terms of payment as shall, in their judgment, be the best obtainable in the circumstances.

IV

The Syndicate Subscribers irrevocably nominate and appoint the Syndicate Managers and the survivor or survivors of them, their agents and attorneys, with full power and authority to do any or all acts and enter into and execute any or all agreements or other instruments necessary or proper, or by the Syndicates Managers deemed expedient in the premises, to carry out or perform the said agreements to construct or purchase said properties, and the purposes of this Syndicate Agreement, and, to that end, to absolutely control the property so to be constructed or purchased, as fully, in all respects, as if they were the absolute owners thereof, with power to borrow money thereon and to pledge the property Syndicate Subscriptions, or any portion thereof, as security therefor, and to sell and dispose of the same upon such terms as may be, in their judgment, for the interests of this Syndicate, and with like power to hold, manage, control and dispose of, in their discretion, any and all stocks and securities acquired on any sale or disposal of said property or any part thereof.

[fol. 32q] V

Unless sooner terminated by the Syndicate Managers in their discretion and upon notice to the Syndicate Sub-

scribers, this agreement shall continue in force and operation for the period of three years from and after the first day of February, 1901, and for such further period as the Syndicate Managers, in their discretion, find reasonably necessary or advisable in the interest of the Syndicate Subscribers.

VI

The Syndicate Subscribers, will, from time to time, and at any time, on call of the Syndicate Managers, and to the amount of such call or calls, make cash payment on account of their respective subscriptions hereunder, upon ten days' written notice by mail from the Syndicate Managers.

All payments hereunder from time to time by the Syndicate Subscribers shall be made to the Trust Company, designated in such call, for the account of the Syndicate Managers.

Each subscriber shall, at the time of making each of the payments called hereunder, receive a certificate issued by the said Trust Company, certifying to the amount of such payment, and the interest of such Subscriber in said Syndicate, subject to the terms and conditions of this agreement. Such certificate shall be in assignable form, and be transferable only on the books of said Trust Company by assignment and surrender of such certificates, and upon such assignment and surrender a new certificate shall be issued in the name of the transferee.

[fol. 32r]

VII

The Syndicate Managers shall have the sole direction, management, and the entire conduct of the Syndicate and the enumeration of particular or specific powers in this agreement shall not be considered as in any way limiting or abridging the general power or discretion intended to be conferred upon and reserved to the Syndicate Managers in order to authorize them to do any and all things proper, necessary or expedient in their discretion to carry out the purposes of this agreement; neither shall they, or any of them, be liable under any of the provisions of this agreement, or in or for any matter connected therewith, except

for want of good faith and failure to exercise reasonable diligence.

VIII

The Syndicate Managers shall be entitled to a commission of one per centum on the amount of the subscriptions hereto, without any obligation to share the same with any subscriber, or to account therefor to the Syndicate or to any Subscriber.

All expenses of the Syndicate Managers, including counsel fees, brokers' commissions and all other disbursements and expenses made by them in connection with the carrying out of the purposes of this agreement, shall be a charge to the Syndicate, and all profits and losses to the Syndicate shall be divided and borne pro rata. The Syndicate Managers are to be subscribers to the Syndicate, and, to the extent of any such subscription or reservation by them, they are to participate in the profits and losses to the same extent as other subscribers.

Should the Syndicate Managers in the carrying out of [fol. 32s] this agreement, sell and dispose of said properties, or stocks, and securities received therefor, the net proceeds for such sale shall be distributed pro rata to the subscribers from time to time in the discretion of the Syndicate Managers. Should said railroad properties not be sold, but be capitalized by the formation of a new company or companies, of which company or companies the Syndicate Managers acquire the securities issued, or should said properties or any part thereof be disposed of, for stocks or securities, which are not sold by the Syndicate Managers, then after the payment of all expenses and commissions accruing under this agreement to said Syndicate Managers, and, upon the termination of the Syndicate, such securities so acquired shall be distributed pro rata to the subscribers hereto, or their assigns, as provided herein.

IX

Each Syndicate Subscriber hereby ratifies, assents to and agrees to be bound by any action of the Syndicate Managers taken under this agreement, and agrees to perform all of his undertakings hereunder, from time to time, on call of the Syndicate Managers, to the full extent of the amount

set opposite his name or allotted him, but he shall be liable hereunder solely to the Syndicate Managers or their assigns, and only to the extent of his individual participation in the Syndicate.

Each and every party hereto will, upon reasonable request, execute and deliver all further writings, which may be necessary or proper to carry this agreement into effect.

The failure of any Syndicate Subscriber to perform any of his undertakings shall not release or affect any other [fol. 32t] Syndicate Subscriber. The Syndicate Managers may, in their discretion, by written consent, release any Syndicate Subscriber. In case any Syndicate Subscriber shall fail to perform any of his undertakings hereunder or be released by the Syndicate Managers, other subscribers may be received by the Syndicate Managers and take the share of the Subscriber so failing to perform his undertakings, or so released. Upon failure of any Syndicate Subscriber to perform any of his undertakings hereunder, the Syndicate Managers shall have the right, at their option, to exclude such Syndicate Subscriber from further interest and participation in the Syndicate, and to hold him liable for all damages caused by his failure.

Nothing contained in this agreement or otherwise shall constitute the Syndicate Subscribers partners with the Syndicate Managers or with one another, or render them liable to contribute more than their ratable amount as aforesaid, or entitle them to any participation in the results or profits of said Syndicate other than as specified in this agreement.

X

This agrement shall bind and benefit ratably, according to the amount of the several subscriptions, not only the parties hereto, but their respective successors, survivors, assigns and personal representatives. An original hereof is to be signed by the Syndicate Managers and deposited with the Trust Company so to be designated by them, and counterparts may be signed by the Syndicate Subscribers and retained by the Syndicate Managers, and all shall be taken and deemed one original instrument.

[fol. 32u] XI

All notices issued by the Syndicate Managers hereunder shall be mailed to the addresses of the Subscribers as given below opposite their respective names.

The holding of certificates issued by said Trust Company shall constitute such holders parties to this agreement, as fully, to all intents and purposes, as if signing the same.

XII

It is agreed that the Syndicate Managers herein named may, at any time in their discretion, appoint and associate with themselves, in the performance of the duties imposed by this agreement, suitable persons or as additional Syndicate managers, and the persons so appointed shall, with those named in this agreement, possess, and exercise all the powers conferred upon the Syndicate Managers by the terms of this contract.

Notice of such appointment, if made, shall be given to the Syndicate Subscribers.

In witness whereof, the Syndicate Managers, parties of the first part, have subscribed an original hereof, and the Syndicate Subscribers, parties of the second part, have subscribed said original, or counterparts thereof, as of the day and year first above written.

Name. Address. Amount.

[fol. 32v] EXHIBIT A2 TO COMPLAINT

Supplemental and Amendatory Agreement, dated this 8th day of April, A. D., 1901, by and between Louis Fitzgerald, of New York City, N. Y., and George J. Gould, of New York City, N. Y., and Joseph Ramsey, of St. Louis, Missouri, hereinafter called the "Syndicate Managers", parties of the first part, and the Syndicate Subscribers hereto, severally, parties of the second part, of whom each is hereafter termed the "Syndicate Subscribers," and all of whom together with the said Louis Fitzgerald, George J. Gould, and Joseph Ramsey, Jr., constitute the Syndicate.

Whereas, an agreement dated the first day of February, A. D., 1901, has been entered into by and between the parties hereto, described and designated above, under which

agreement it was, upon certain conditions, proposed by said Syndicate Managers to complete certain negotiations then in progress for the construction or the purchase of the whole or a controlling interest of and in certain lines of railway, rolling stock and motive power equipment as therein described, and it was recited in substance that for the purpose of providing the necessary money for the construction or purchase, or both, of said properties, said Syndicate Managers and said Subscribers wished to form a syndicate to advance the necessary money to the amount of $15,000,000.00, for the construction or purchase of said property and for the other purposes in said agreement set forth; and

Whereas, said agrement provided that each subscriber thereto and to any counterpart thereof should set opposite his name the amount of his subscription to the Syndicate [fol. 32w] and should be called upon to pay and be liable only for such amount as should bear to the obligation of the Syndicate not exceeding $15,000,000, the same ratio or proportion as his subscription bore to said maximum obligation and that, in the event that more than the aggregate amount of $15,000,000, were subscribed, the Syndicate Managers might reduce any or all subscriptions.

Whereas, said agreement was subscribed by the Subscribers, parties hereto, in amounts aggregating $20,000,000 and

Whereas, the Subscribers desire and the Syndicate Managers deem it desirable, that the Syndicate obligation be increased to the said aggregate amount of such subscriptions, namely: $20,000,000.

Now this agreement, supplemental and amendatory of said agreement of February 1st, A. D., 1901,

Witnesseth:

That in consideration of the premises and their mutual promises, the parties hereto and the Syndicate Subscribers severally agree with each other and the Syndicate Managers and said agreement of February 1st, 1901, be and the same is hereby so modified and amended that the amount of money therein expressed as the amount or obligation of the Syndicate shall be $20,000,000 instead of $15,000,000, and that all the terms and provisions of said agreement relating to or based upon said amount of $15,000,000 as therein expressed, shall be and be deemed and construed

to be applicable to said increased amount of $20,000,000, and the Subscribers agree to and with each other and with [fol. 32x] the Syndicate Managers that their subscriptions to said agreement of February 1st, A. D., 1901, shall stand as made for and in respect of the said Syndicate amount of obligation of $20,000,000. In all other respects said agreement of February 1st, A. D., 1901, and all rights and obligations of the parties thereto shall be and remain unchanged, the sole purpose and effect of this agreement being to substitute the amount of $20,000,000 in place of the amount of $15,000,000 wherever the latter amount is expressed in said agreement of February 1st, A. D. 1901.

In witness whereof, the Syndicate Managers parties of the first part, have subscribed an original hereof, and the Syndicate Subscribers, parties of the second part, have subscribed said original or counterparts thereof as of the day and year first above written.

EXHIBIT B TO COMPLAINT

Plan for Financing Pittsburg & Toledo Syndicate

April 11, 1904

The amount of cash required to meet the present commitments of the Pittsburgh & Toledo Syndicate is as follows:

[fol. 32y] Amount expended to Oct. 1, 1923 ..	$17,202,640
Estimated amount required to complete work in progress including lines to connect with the Union Railroad Company, the South Side Freight House Spur, the Allegheny Branch and Duquesne Way Branch	12,510,742
Making a total of	$29,713,382
or, including interest due on loans to date, say in round numbers	$30,000,000

This cash to be provided as follows:

1. From Syndicate subscriptions to be paid in full	$20,000,000
2. From sale of First Mortgage Four Per Cent Gold Bonds of a Company to be formed by a consolidation of the existing Pittsburg Extension Companies, which for present purposes will be called the Pittsburg Terminal Company	10,000,000
	$30,000,000

The plan suggested for financing these requirements is as follows:

I.

Consolidate the Pittsburgh extension companies (the consolidated company for present purposes to be called the Pittsburg Terminal Company) with a capital stock of say	$10,000,000

[fol. 32z]

II.

The Pittsburg Terminal Company will then execute two mortgages securing issues of First and Second Mortgage Bonds respectively.

First Mortgage Four Per Cent Fifty-Year Gold Bonds and Their Appropriation:

Authorized issue	$50,000,000

Appropriated as follows:

To Pittsburg & Toledo Syndicate in partial liquidation of syndicate participations	$13,400,000
To Wabash R. R. Co., in exchange for $6,000,000 cash and a traffic contract hereafter described	6,600,000
Reserved for use from time to time as required to finish all improvements in Pittsburgh and the Pittsburgh District now in progress and according to existing plans	5,000,000

To be reserved for new property, extensions, etc., under carefully guarded restrictions, including a covenant by the Pittsburg Terminal Company not to issue more than $35,000,000 of said bonds until after the interest is being earned and regularly paid upon both First and Second Mortgage Bonds.....	25,000,000
	$50,000,000

These bonds to bear interest from June 1, 1904; the first coupon to be payable June 1, 1905, and semi-annually thereafter.

[fol. 32aa] Second Mortgage Four Per Cent Fifty-Year Gold Bonds and Their Appropriation:

Authorized Issue	$20,000,000
Appropriated to partially liquidate Pittsburgh & Toledo Syndicate participations.....	$18,000,000
For expenses of syndicate, management, etc...	2,000,000
	$20,000,000

These bonds to be Income Bonds until June 1, 1910, and thereafter Fixed Charge Bonds.

Common Stock Wabash Railroad Company...	$10,000,000

To be issued to Syndicate in final liquidation of Syndicate participations and specifically in exchange for Pittsburgh Terminal Company stock.

Security for Bonds:

The bonds will be secured by First and Second Mortgages respectively upon all the property of the Pittsburg Terminal Company and upon such additional property as may be secured in the future from the sale of the bonds reserved under the mortgage and shall also be collaterally secured by a control of the Wheeling & Lake Erie Railroad Co. represented by

118,700	shares of common stock out of a total issue of	200,000 shares.
64,238	shares of 2d pfd. stock out of a total issue of	120,000 shares.
8,475	shares of 1st pfd. stock out of a total issue of	50,000 shares.
191,413		370,000

Total $19,141,300 par value or 51.73 per cent of $37,000,000 total outstanding.

[fol. 32bb] There shall also be assigned to the Trustee of the Mortgages as additional security for the bonds a traffic and trackage contract between the Pittsburg Terminal Co. and the Wheeling & Lake Erie R. R. Co. and Wabash Railroad Co. The main features of the traffic and trackage contract will be the same as the contract now in existence with added provisions whereby the Wabash R. R. Co. and the Wheeling & Lake Erie R. R. Co. will pledge all of their net earnings from traffic interchanged with the Pittsburg Terminal Co. and consigned to and from Chicago and St. Louis and all points east thereof up to an amount which may be necessary to meet any deficiency of income of the Pittsburg Terminal Co. necessary to pay interest on the First and Second Mortgage bonds. Net earnings from interchanged traffic shall be fixed at 25 per cent of the gross earnings therefrom.

Contribution of any deficiency to be made by Wabash Railroad Company and Wheeling & Lake Erie Railroad Company pro rata on basis of gross earnings on traffic interchanged with Pittsburg Terminal Company.

Summary

Financial requirements at present	$30,000,000
Resoures:	
From payment in full of syndicate subscriptions	$20,000,000
From sale of $6,600,000 First Mortgage Bonds to Wabash R. R. Co.	6,000,000

From sale of First Mortgage Bonds reserved under the mortgage	4,000,000
	$30,000,000

[fol. 32cc] Result to Syndicate

The Syndicate pays	$20,000,000

The Syndicate receives:

First Mortgage Bonds,	67 per cent	13,400,000
Second Mortgage Bonds,	90 "	18,000,000
Wabash Common Stock	50 "	10,000,000
	207 "	$41,400,000

We the undersigned participants in the Pittsburg Toledo Syndicate hereby approve and accept, in respect of our subscriptions or participations respectively, the foregoing plan, dated April 11, 1904, for financing the undertaking of the Syndicate:

—— ——.

[fol. 32dd] In Supreme Court of New York

[Title omitted]

Amended Answer of George J. Gould

The defendant George J. Gould, by his attorneys, Chadbourne, Babbitt & Wallace, for his amended answer to the complaint herein alleges:

First. This defendant admits the allegations set forth and contained in paragraph First of the complaint herein, except that this defendant denies that he has any knowledge or information sufficient to form a belief whether, on the 13th day of September, 1910, or prior to the commencement of this action, an order of the Circuit Court of the United States for the Western District of Pennsylvania was made and filed granting to the plaintiffs herein permission to institute and maintain this action as Receivers of the Wabash Pittsburgh Terminal Railway Company.

[fol. 32ee] Second. This defendant admits the allegations set forth and contained in paragraph Second of the complaint herein, except that he denies that the defendants herein, or any of them, were members of, subscribers to, or Syndicate Managers of the syndicate referred to in said paragraph, subsequent to the year 1904 when said syndicate was dissolved and its assets distributed among the members and subscribers thereof.

Third. This defendant admits the allegations set forth and contained in paragraph Third of the complaint herein.

Fourth. This defendant admits the allegations set forth and contained in paragraph Fourth of the complaint herein, except that he denies that the syndicate and its managers in all things dominated and controlled the action of said Terminal Company.

Fifth. This defendant admits the allegations set forth and contained in paragraph Fifth of the complaint herein.

Sixth. This defendant admits the allegations set forth and contained in paragraph sixth of the complaint herein.

Seventh. This defendant admits the allegations set forth and contained in paragraph Seventh of the complaint herein.

Eighth. This defendant denies the allegations of paragraph Eighth of the complaint as therein stated and set forth, except that this defendant admits that, pursuant to [fol. 32ff] the offer set forth in said complaint, $6,600,000 First Mortgage Fifty-Year Four Per Cent Gold Bonds of said Terminal Company were duly issued by said Terminal Company and delivered to The Wabash Railroad Company, and the purchase price thereof, to wit, $6,000,000, was paid by The Wabash Railroad Company to the syndicate in said paragraph referred to, pursuant to direction theretofore made by the Terminal Company, and further admits that, pursuant to the provisions of said offer, and more particularly of its fourth numbered paragraph, the defendants, as managers of the aforesaid syndicate, did call the amount of the syndicate subscriptions theretofore uncalled and did receive, in response to such call the entire amount thereof, to wit, $6,000,000.

Ninth. This defendant denies the allegations of paragraph Ninth of the complaint, as therein set forth and alleged, except that this defendant admits that on or about September 3, 1910, the plaintiffs made demand, in writing, upon this defendant for an accounting of all moneys and other property received by the Syndicate Managers of said syndicate for or on account of The Wabash Pittsburgh Terminal Railway Company, and further admits that the account so demanded has not been rendered; and this defendant further admits that there have been paid to the Terminal Company by the syndicate referred to in the complaint herein certain sums of money.

For a first separate and distinct defense to the cause of action attempted to be set forth by the complaint herein, [fol. 32gg] this defendant alleges and shows as follows:

Tenth. That by agreement in writing, dated February 1, 1901, between Louis Fitzgerald, George J. Gould, Joseph Ramsey, Jr., and others, a copy of which agreement is annexed to the complaint herein and marked Exhibit A-1, a syndicate was formed for the purpose, among other things, of providing for the construction or purchase of a line of railway from Pittsburgh, Pennsylvania, through the States of Pennsylvania, West Virginia and Ohio, to Toledo, Ohio, and for other purposes; and that by a supplemental and amendatory agreement in writing, dated April 8, 1901, between Louis Fitzgerald, George J. Gould, Joseph Ramsey, Jr., and others, a copy of which agreement is annexed to the complaint herein and marked Exhibit A-2, the maximum amount of the obligation of said syndicate was increased to $20,000,000, that amount having been subscribed by the subscribers parties to said agreement. That prior to May 9, 1904, the Syndicate Managers of said syndicate had called for the payment of seventy per cent of the amount of the subscriptions to said syndicate.

That The Wabash Pittsburgh Terminal Railway Company, hereinafter called the Terminal Company, was formed by the consolidation of The Pittsburgh, Carnegie & Western Railroad Company, a corporation of the State of Pennsylvania, The Pittsburgh, Toledo & Western Railroad Company, a corporation of the State of Ohio, and the Cross Creek Railroad Company, a corporation of the State of West Virginia, and by the terms of the said consolida-

tion, as well as by virtue of the laws of the States under which said consolidation was effected and the said Termi-
[fol. 32hh] nal Company created, the last named company became liable for all the debts and obligations of the consolidating companies and assumed and agreed to pay the same. That prior to the 9th day of May, 1904, the said syndicate had advanced and loaned to the said consolidating companies and to the said Terminal Company many millions of dollars in connection with and for the purpose of constructing and acquiring the properties of the said companies, and upon said last named date, the Terminal Company was indebted to the said syndicate in the sum of many millions of dollars. That the syndicate had prior to the 9th day of May, 1904, itself borrowed of the Mercantile Trust Company, a corporation of the State of New York, a very large part of the money so advanced by it to the said Wabash Pittsburgh Terminal Railway Company and its predecessors by the consolidation of which such company was formed, and such syndicate was indebted upon said date to the said Mercantile Trust Company for the moneys so borrowed in a sum exceeding eight millions of dollars, and all of such indebtedness was incurred by the syndicate in connection with the construction of the railroads, and the acquisition of the properties of the Terminal Company, and all of the money so borrowed from said trust company had been used and expended for such purposes.

This defendant further alleges that on the 9th day of May, 1904, the syndicate made and submitted to the said Terminal Company the written proposition set forth in the complaint, and that such proposition was upon said date duly accepted by the Board of Directors of said Company, and on the 11th day of May, 1904, such action was duly ratified by the stockholders of said company, all as alleged in the complaint.

[fol. 32ii] That thereafter and upon or prior to the 17th day of May, 1904, the said Terminal Company caused to be delivered to The Wabash Railroad Company $6,600,000 par value of the said Terminal Company's First Mortgage Fifty Year Four Per Cent Gold Bonds, all as provided in the proposition aforesaid, and ordered and directed The Wabash Railroad Company to pay the purchase price thereof, to wit, $6,000,000, to the syndicate managers, and

authorized the syndicate managers to use and apply such moneys, when received, as provided in the agreement aforesaid entered into between the syndicate and the said Terminal Company.

That on the 17th day of May, 1904, the Wabash Railroad Company paid to the syndicate managers under the aforesaid authority, the sum of $6,000,000, the same being the purchase price of such bonds.

That subsequent to the 9th day of May, 1904, and prior to the 20th day of June, 1904, the syndicate called the unpaid portion of the syndicate subscriptions of $20,000,000, to wit, thirty per cent thereof, and prior to the 20th day of June, 1904, the syndicate had received payments thereon amounting to several millions of dollars, although a large amount owing upon such subscriptions remained unpaid upon said date.

That prior to June 20, 1904, the syndicate liquidated its aforesaid indebtedness to the Mercantile Trust Company, and paid and discharged the same by the use of the funds aforesaid which had come into its hands, to wit; the $6,000,000 received from The Wabash Railroad Company and the moneys theretofore received from syndicate subscribers, and after discharging such indebtedness by the [fol. 32jj] use of such funds, there remained in the hands of the syndicate on the 20th day of June, 1904, a balance of such funds so received by it amounting to the sum of $1,909,506.05, and no more.

Defendant further alleges that on the 20th day of June, 1904, the syndicate addressed and delivered to the Terminal Company a communication in writing stating the account and condition of the same as it existed upon that date in respect of all matters mentioned and referred to in the complaint and all moneys received by the syndicate theretofore from The Wabash Railroad Company, or from syndicate subscribers, which communication was in the following form and terms, to wit:

"New York, June 20, 1904.

"The Wabash Pittsburgh Terminal Railway Company, George J. Gould, Esq., Chairman of Board, etc., No. 195 Broadway.

"Dear Sir:

"Referring to the communication of the Pittsburgh-Toledo Syndicate, addressed to the Board of Directors of your Company under date of May 9, 1904, I beg to advise you that, out of the moneys received upon the sale of First Mortgage Bonds to The Wabash Railroad Company and from the syndicate subscriptions as mentioned in said letter, the Syndicate Managers have liquidated the indebtedness incurred by the Syndicate, and have in their hands on this date, after such expenditure, the sum of $1,909,506.05. [fol. 32kk] "This amount has been deposited to the credit of H. B. Henson, Treasurer of The Wabash Pittsburgh Terminal Railway Company, in the Mercantile Trust Company, upon the condition and distinct understanding with you that said amount of money will be receipted for by you to the Syndicate Managers and will be used by your Company in connection with the construction of its railroad, and the acquisition of its property, and the payment of expenses incident to its organization, and the creation and issue of its securities.

"Will you kindly confirm the foregoing, and oblige,

"Very respectfully yours,

"Pittsburgh Toledo Syndicate, by (Signed) Alvin W. Krech, Secretary."

That upon the receipt of the same and upon the same date, the Terminal Company duly accepted such statement as a true statement of such account and of the balance owing to the Terminal Company thereon, and notified the syndicate of such acceptance by a communication in writing, addressed and delivered to the syndicate, which was in the following form and terms, to wit:

"New York, June 20, 1904.

"The Pittsburgh-Toledo Syndicate,
"New York City.

"Dear Sir:

"I beg to acknowledge the receipt of your favor of this date advising that the amount of $1,909,506.05 has been [fol. 3211] deposited by you to the credit of H. B. Henson, Treasurer of The Wabash Pittsburgh Terminal Railway Company in the Mercantile Trust Company and I note that such deposit is made upon the condition and distinct understanding expressed in your letter, namely: that said money will be receipted for to the Syndicate Managers and will be used by this Company in connection with the construction of its railroad and the acquisition of its property and the payment of expenses incident to its organization and the creation of its securities.

"I write to acknowledge the receipt of the above mentioned sum of money and to confirm the understanding contained in your letter as above.

"Very respectfully yours, (Signed) H. B. Henson, Treasurer, The Wabash Pittsburgh Terminal Railway Company."

That the balance upon said date due and owing from the syndiate to the Terminal Company, to wit, $1,909,506.05, was deposited by the syndicate with the said Mercantile Trust Company to the credit of the Terminal Company, all with the knowledge and consent of the said Terminal Company and said Terminal Company received said sum as the balance then owing on said account, and thereafter used and applied such funds and the whole thereof to its corporate purposes. That the correctness of the account stated as aforesaid has never been questioned by said Terminal Company, nor any further or more particular or detailed statement of said account demanded, nor was it [fol. 32mm] questioned by the receivers of said Terminal Company, or any further or more particular accounting requested by such receivers prior to the 3d day of September, 1910, upon which day, as alleged in the complaint, a demand for an accounting was made by the receivers.

That subsequent to the 20th day of June, 1904 and before the end of the year 1904, further payments were made by

the syndicate subscribers upon their subscriptions to the syndicate undertaking, until the whole amount of the balance thereof remaining unpaid on June 20, 1904, was paid, and at the time or times of payment thereof, the whole of each of such payments was immediately paid over to and received by the Terminal Company and thereafter used and applied by it to its corporate purposes, and the Terminal Company received the final payments actually made as aforesaid upon said subscriptions as the final payment to be made by the syndicate to the Terminal Company on account of moneys received by the syndicate from the syndicate subscribers, or otherwise, and as a final and complete performance and discharge of all obligations resting upon the syndicate under its proposition to the Terminal Company of May 9, 1904.

That thereafter and in the year 1904, it was determined by the syndicate managers to dissolve such syndicate and to distribute its assets to the members thereof, which fact was well known to the Terminal Company, its officers and directors at the time; and pursuant to such determination and with the full knowledge and consent of the Terminal Company, its officers and directors, such managers proceeded to and did wind up the affairs and business of the syndicate and distribute to its members all of the assets [fol. 32nn] thereof, all of which was done by the syndicate managers in reliance upon the acquiescence and acceptance by the Terminal Company of the aforesaid statement of account made upon June 20, 1904, and the acceptance by the Terminal Company of the moneys thereafter paid to it derived from syndicate subscriptions as a performance and discharge in full of all obligations resting upon the syndicate by virtue of the proposition of the syndicate of May 9, 1904, all of which was at the time well known to the Terminal Company, its officers and directors.

And this defendant alleges, upon information and belief, that upon the 20th day of June, 1904, at the time when such account was stated as aforesaid, the officers and directors of said Terminal Company, and said company were fully advised and well knew what amount of moneys had theretofore been received by the syndicate from The Wabash Railroad Company and from the syndicate subscribers

on calls made as aforesaid on syndicate subscriptions, and the use and application of such funds which had been made by the syndicate and of the discharge by the syndicate out of such funds of the indebtedness of the syndicate to the said Mercantile Trust Company and the amount of such indebtedness, and that such indebtedness was incurred for moneys borrowed by the syndicate and advanced to the Terminal Company and its predecessors, for use and used in the construction and acquisition of the properties of the said company; and this defendant claims that by reason of the matters aforesaid, these plaintiffs are now estopped to demand or require any further accounting of the defendants for, of or on account of any moneys received by the syndi- [fol. 3200] cate from The Wabash Railroad Company or from the syndicate subscribers prior to the 20th day of June, 1904, or at any time thereafter.

For a second separate and partial defense to the matters pleaded in the complaint, and in answer to the demand for an accounting as to moneys had or received by the syndicate or syndicate managers from The Wabash Railroad Company, or in payment upon subscriptions to the syndicate undertaking, prior to the 20th day of June, 1904, defendant shows and alleges as follows:

Eleventh. That by agreement in writing, dated February 1, 1901, between Louis Fitzgerald, George J. Gould, Joseph Ramsey, Jr., and others, a copy of which agreement is annexed to the complaint herein and marked Exhibit A-1 a syndicate was formed for the purpose, among other things, of providing for the construction or purchase of a line of railway from Pittsburgh, Pennsylvania, through the State of Pennsylvania, West Virginia, and Ohio, to Toledo, Ohio, and for other purposes; and that by a supplemental and amendatory agreement in writing, dated April 8, 1901, between Louis Fitzgerald, George J. Gould, Joseph Ramsey, Jr., and others, a copy of which agreement is annexed to the complaint herein and marked Exhibit A-2, the maximum amount of the obligation of said syndicate was increased to $20,000,000, that amount having been subscribed by the subscribers parties to said agreement. That prior to May 9, 1904, the Syndicate Managers of said Syndicate had

called for the payment of seventy per cent. of the amount of the subscriptions to said syndicate.

[fol. 32pp] That The Wabash Pittsburgh Terminal Railway Company, hereinafter called the Terminal Company, was formed by the consolidation of the Pittsburg, Carnegie & Western Railroad Company, a corporation of the State of Pennsylvania, The Pittsburg, Toledo & Western Railroad Company, a corporation of the State of Ohio, and the Cross Creek Railroad Company, a corporation of the State of West Virginia, and by the terms of the said consolidation, as well as by virtue of the laws of the State under which said consolidation was effected and the said Terminal Company created, the last named company became liable for all the debts and obligations of the consolidating companies and assumed and agreed to pay the same. That prior to the 9th day of May, 1904, the said syndicate had advanced and loaned to the said consolidating companies and to the said Terminal Company many millions of dollars in connection with and for the purpose of constructing and acquiring the properties of the said companies, and upon said last named date, the Terminal Company was indebted to the syndicate in the sum of many millions of dollars. That the syndicate had prior to the 9th day of May, 1904, itself borrowed of the Mercantile Trust Company, a corporation of the State of New York, a very large part of the money so advanced by it to the said Terminal Company and its predecessors by the consolidation of which such company was formed, and such syndicate was indebted upon said date to the said Mercantile Trust Company for the moneys so borrowed in a sum exceeding eight millions of dollars, and all of such indebtedness was incurred by the syndicate in connection with the construction of the railroads and the acquisition of the properties of the Terminal [fol. 32qq] Company, and all of the money so borrowed from said Trust Company had been used and expended for such purposes.

This defendant further alleges that on the 9th day of May, 1904, the syndicate made and submitted to the said Terminal Company the written proposition set forth in the complaint, and that such proposition was upon said date duly accepted by the Board of Directors of said Company, and on the 11th day of May, 1904, such action was duly

ratified by the stockholders of said company, all as alleged in the complaint.

That thereafter and upon or prior to the 17th day of May, 1904, the said Terminal Company caused to be delivered to The Wabash Railroad Company $6,600,000 par value of the said Terminal Company's First Mortgage Fifty Year Four Per Cent Gold Bonds, all as provided in the proposition aforesaid, and ordered and directed The Wabash Railroad Company to pay the purchase price thereof, to wit, $6,000,000, to the syndicate managers, and authorized the syndicate managers to use and apply such moneys, when received, as provided in the agreement aforesaid entered into between the syndicate and the said Terminal Company.

That on the 17th day of May, 1904, The Wabash Railroad Company paid to the syndicate managers under the aforesaid authority, the sum of $6,000,000, the same being the purchase price of such bonds.

That subsequent to the 9th day of May, 1904, and prior to the 20th day of June, 1904, the syndicate called the unpaid portion of the syndicate subscriptions of $2,000,000, to wit, thirty per cent thereof, and prior to the 20th day of June, 1904, the syndicate had received payments thereon [fol. 32rr] amounting to several millions of dollars, although a large amount owing upon such subscriptions remained unpaid upon said date.

That prior to June 20, 1904, the syndicate liquidated its aforesaid indebtedness to the Mercantile Trust Company, and paid and discharged the same by the use of the funds aforesaid which had come into its hands, to wit: the $6,000,000 received from The Wabash Railroad Company and the moneys theretofore received from syndicate subscribers, and after discharging such indebtedness by the use of such funds, there remained in the hands of the syndicate on the 20th day of June, 1904, a balance of such funds so received by it amounting to the sum of $1,909,506.05 and no more.

Defendant further alleges that on the 20th day of June, 1904, the syndicate addressed and delivered to the Terminal Company a communication in writing stating the account and condition of the same as it existed upon that date in respect of all matters mentioned and referred to in the complaint and all moneys received by the syndicate

theretofore from The Wabash Railroad Company, or from syndicate subscribers, which communication was in the following form and terms, to wit:

"New York, June 20, 1904.

"The Wabash Pittsburgh Terminal Railway Company, George J. Gould, Esq., Chairman of Board, etc., No. 195 Broadway.

"DEAR SIR: Referring to the communication of the Pittsburg-Toledo Syndicate, addressed to the Board of Direc- [fol. 32ss] tors of your Company under date of May 9, 1904, I beg to advise you that, out of the moneys received upon the sale of First Mortgage Bonds to The Wabash Railroad Company and from the syndicate subscriptions as mentioned in said letter, the Syndicate Managers have liquidated the indebtedness incurred by the Syndicate, and have in their hands on this date, after such expenditure, the sum of $1,909,506.05.

"This amount has been deposited to the credit of H. B. Henson, Treasurer of the Wabash Pittsburgh Terminal Railroad Company, in the Mercantile Trust Company, upon the condition and distinct understanding with you that said amount of money will be receipted for by you to the Syndicate Managers and will be used by your Company in connection with the construction of its railroad, and the acquisition of its property, and the payment of expenses incident to its organization, and the creation and issue of its securities.

"Will you kindly confirm the foregoing, and oblige,

"Very respectfully yours, Pittsburg-Toledo Syndicate, by (Signed) Alvin W. Krech, Secretary."

That upon the receipt of the same and upon the same date, the Terminal Company duly accepted such statement as a true statement of such account and of the balance owing to the Terminal Company thereon, and notified the syndicate of such acceptance by a communication in writ- [fol. 32tt] ing, addressed and delivered to the syndicate, which was in the following form and terms, to wit:

"New York, June 20, 1904 .

"The Pittsburgh-Toledo Syndicate, New York City.

"Dear Sir: I beg to acknowledge the receipt of your favor of this date advising that the amount of $1,909,506.05 has been deposited by you to the credit of H. B. Henson, Treasurer of the Wabash Pittsburgh Terminal Railway Company in the Mercantile Trust Company and I note that such deposit was made upon the condition and distinct understanding expressed in your letter, namely: that said money will be receipted for to the Syndicate Managers and will be used by this Company in connection with the construction of its railroad and the acquisition of its property and the payment of expenses incident to its organization and the creation of its securities.

"I write to acknowledge the receipt of the above mentioned sum of money and to confirm the understanding contained in your letter as above.

'Very respectfully yours, (Signed) H. B. Henson, Treasurer.

"The Wabash Pittsburgh Terminal Railway Company."

[fol. 32uu] That the balance upon said date due and owing from the syndicate to the Terminal Company, to wit, $1,909,506.05, was deposited by the syndicate with the said Mercantile Trust Company to the credit of the Terminal Company, all with the knowledge and consent of the said Terminal Company, and said Terminal Company received said sum as the balance *them* owning on said account, and thereafter used and applied such funds and the whole thereof to its corporate purposes. That the correctness of the account stated as aforesaid has never been question- by said Terminal Company, nor any further or more particular or detailed statement of said account demanded, nor was it questioned by the receivers of said Terminal Company, or any further or more particular accounting requested by such receivers prior to the 3rd day of September, 1910, upon which day, as alleged in the complaint, a demand for an accounting was made by the receivers.

And this defendant alleges, upon information and belief, that upon the 20th day of June, 1904, at the time when such account was stated as aforesaid, the officers and directors

of said Terminal Company, and said company, were fully advised and well knew what amount of moneys had theretofore been received by the syndicate from The Wabash Railroad Company and from the syndicate subscribers on calls made as aforesaid on syndicate subscriptions, and of the use and application of such funds which had been made by the syndicate and of the discharge by the syndicate out of such funds of the indebtedness of the syndicate to the said Mercantile Trust Company and the amount of such indebtedness, and that such indebtedness was incurred for [fol. 32vv] moneys borrowed by the syndicate and advanced to the Terminal Company and its predecessors, for use and used in the construction and acquisition of the properties of the said company; and this defendant claims that by reason of the matters aforesaid, these plaintiffs are now estopped to demand or require any further accounting of the defendants for, of or on account of any moneys received by the syndicate from The Wabash Railroad Company or from the syndicate subscribers prior to the 20th day of June, 1904.

For a third separate and distant defense to the cause of action attempted to be set forth by the complaint herein, this defendant alleges and shows as follows:

Twelfth.—That there is a defect of parties defendant to the action, in this, that in addition to the defendants named in the summons and complaint herein, the following named corporations and persons, among others, were at the time of the making by the syndicate of the proposition of May 9, 1904, addressed to the Terminal Company, as alleged in the complaint, and thereafter, subscribers to and members of said syndicate and each of said persons and corporations is a necessary party defendant to this action, viz.: Howard Gould, Edwin Gould, Chauncey M. Depew, Alvin W. Krech, William H. McIntyre, Washington E. Connor, Ezra S. Connor, Charles E. Silkworth, James I. Kernaghan, Robert Benson, George H. Squire, James A. Trowbridge, Frederick K. Trowbridge, George D. Mackay, William A. Read, Arthur S. Fairchild, George Trowbridge Hollister, Charles H. Dow, Thomas H. Hubbard, Thomas H. Wheeler, Cyrus J. Lawrence, Richard H. Lawrence, Henry C. Lawrence, [fol. 32ww] Henry C. Deming, National Bank of Commerce of New York, Columbia-Knickerbocker Trust Company,

Equitable Life Assurance Society, Equitable Trust Company, Guaranty Trust Company, Bankers Trust Company, Metropolitan Financial & Industrial Company, and Marcus Aaron, Charles A. Coffin; and Frederick J. Lisman, David M. Minzesheimer and William Goodman, co-partners doing business under the firm name of F. J. Lisman & Company; and John Farson, Arthur B. Leach, James C. Campbell and Ferry W. Leach, co-partners formerly doing business under the firm name of Farson, Leach & Co.; Henry M. Alexander, Central Trust Company, Metropolitan Life Insurance Company, H. Clay Pierce, Archibald S. White, Walter S. Wilson, Henry R. Winthrop as Trustee; and Waldron P. Brown, Charles D. Dickey, Eugene Delano, George H. Frazier, James Brown, James Crosby Brown, Thatcher Magoun Brown, Moreau Delano, Francis A. Hamilton, Mark W. Collett, James May Duane, Alexander Hargreaves Brown, Lawrence E. Chalmers, Edward C. Brown, Montagu C. Norman, James Leigh Wood and Louis Curtis, co-partners formerly doing business under the firm name of Brown Brothers & Co.; James W. Alexander and Guy Richards as Executor of the Last Will and Testament of Louis Fitzgerald, deceased. On information and belief, that all of the foregoing persons and corporations are within the jurisdiction of this court.

As a fourth defense to the alleged cause of action set forth in the complaint, the defendant alleges:

Thirteenth. That the alleged cause of action stated in the complaint did not accrue within six years before the commencement of this action.

[fol. 32xx] As a fifth defense to the alleged cause of action set forth in the complaint, the defendant alleges:

Fourteenth. That for some time prior to 1901, down to and including after the commencement of this action, this defendant was a resident of the State of New Jersey, residing at Lakewood, Monmouth County, State of New Jersey.

Fifteenth. That in and by the Compiled Statutes of the State of New Jersey (3 Compiled Statutes, p. 3162), it is provided as follows:

"1. Six years' limitations. That all actions of trespass, quare clausum fregit, all actions, of trespass, detinus,

trover, and replevin for taking away of goods and chattels, all actions of debt, founded upon any lending or contract without specialty, or for arrearages of rent due on a parol demise, and all actions of account and upon the case, except actions for slander, and except, also such actions as concern the trade or merchandise between merchant and merchant, their factors, agents, and servants, shall be commenced and sued within six years next after the cause of such actions shall have accrued, and not after."

Sixteenth. Upon information and belief, the defendant alleges that, under the decisions of the courts of New Jersey, the cause of action attempted to be set forth in the complaint is a cause of action in which there is a concurrent remedy at law, and that by those decisions the said cause of action, if brought in the State of New Jersey, would be barred by reason of the statute pleaded in the preceding paragraph.

[fol. 32yy] Seventeenth. That by reason of the facts set forth in paragraphs Fourteenth, Fifteenth and Sixteenth, the alleged cause of action stated in the complaint is barred and no action can be brought thereon in the courts of this State against defendant.

Wherefore, defendant demands judgment that the complaint be dismissed as against him with costs.

Chadbourne, Babbitt & Wallace, Attorneys for Defendant, George J. Gould, Office and Post Office Address, No. 14 Wall Street, Borough of Manhattan, New York City.

Duly sworn to by George J. Gould, jurat omitted in printing.

[fol. 32zz] In Supreme Court of New York

Fifth Defense Alleged in Amended Answer of Myron T. Herrick

Fourteenth. That for some time prior to 1901, down to and including after the commencement of this action, this

defendant was a resident of the State of Ohio, residing in the City of Cleveland, Cuyahoga County, State of Ohio.

Fifteenth. That in and by the General Code of the State of Ohio, it is provided as follows:

"Sec. 11222. An action upon a contract not in writing, express or implied, or upon a liability created by statute other than a forfeiture or penalty, shall be brought within six years after the cause thereof accrued. (R. S. Sec. 4981.)"

"Sec. 11227. An action for relief not hereinbefore provided for, shall be brought within ten years after the cause thereof accrued. This section does not apply to an action on a judgment rendered in another state or territory. (R. S. Sec. 4985.)"

"Sec. 11234. If the laws of any state or country where the cause of action arose limits the time for the commencement of the action to a less number of years than do the statutes of this state in like causes of action then said cause of action shall be barred in this state at the expiration of said lesser number of years."

Sixteenth. Upon information and belief, this defendant alleges that, under the decisions of the Courts of Ohio, the cause of action attempted to be set forth in the complaint is a cause of action in which there is a concurrent remedy at law, and that by those decisions the said cause of action, if [fol. 32aaa] brought in the State of Ohio, would be barred by reason of the statute pleaded in the preceding paragraph.

Seventeenth. That by reason of the facts set forth in paragraphs Fourteenth, Fifteenth and Sixteenth, the alleged cause of action stated in the complaint is barred and no action can be brought thereon in the Courts of this State against defendant.

[fol. 33] IN SUPREME COURT OF NEW YORK

[Title omitted]

NOTICE OF CROSS-MOTION

Sirs:

Please take notice, that Schuyler Neilson Rice and Kingdon Gould, each as an executor of the estate of George J. Gould, deceased, appearing specially and solely for the purposes of this motion and for no other purpose and by their attorneys, and upon the affidavits of Schuyler Neilson Rice, Kingdon Gould and George W. C. McCarter and William Wallace, Jr., will move this court on Thursday, October 29, 1925, or as soon thereafter as counsel can be heard in Special Term, Part I of this court, upon the return of the order to show cause herein, dated October 9, 1925, for an order vacating and setting aside the service of such order and the order itself on the grounds:

1. That this court has no jurisdiction over Schuyler Neilson Rice and Kingdon Gould or either of them, as such executors of the estate of George J. Gould, deceased, and has no jurisdiction over any assets of the estate of said deceased.

[fol. 34] 2. Because the question sought to be presented by the order to show cause has become res judicata and foreclosed against these plaintiffs, by the decision of the Court of Appeals rendered in this cause on July 15, 1925, and reported in 240 N. Y. 379.

All as more particularly set forth in the affidavits of said Rice, Gould and McCarter hereto annexed; and for such other relief in the premises as to the court seems proper.

Dated, New York, October 24th, 1925.

Yours, etc., Chadbourne, Stanchfield & Levy, Office & P. O. Address No. 120 Broadway, Borough of Manhattan, New York City; Gillespie & O'Connor, Office & P. O. Address No. 20 Vesey Street, Borough of Manhattan, New York City, appearing specially and solely as attorneys for Schuyler Neilson Rice and Kingdom Gould, as executors, for the purposes of this motion only.

To Larkin & Perry, Esqs., Attorneys for Plaintiffs, 80 Broadway, New York City; Louis Marshall, Esq., of Counsel, 120 Broadway, New York City.

[fol. 35] IN SUPREME COURT OF NEW YORK

[Title omitted]

AFFIDAVIT OF SCHUYLER NEILSON RICE

STATE OF NEW YORK,
County of New York, ss:

Schuyler Neilson Rice, appearing specially and solely for the purposes hereof, being duly sworn, says:

1. On Thursday, October 15, 1925, I received by mail at 165 Broadway, New York City, N. Y., one copy and also at New Brunswick, New Jersey, another copy of a document comprising eighteen typewritten pages, entitled in this action "Affidavits and Order to Show Cause to Revive Action." The affidavits, one by Raphael Brill, and the other by James Marshall, were verified on October 8th, and the order was signed on October 9, 1925, by Joseph M. Pros-
[fol. 36] kauer, Justice of the Supreme Court of the State of New York. The order required Kingdon Gould and myself to show cause at a Special Term of said court on Friday, October 23, 1925, or as soon thereafter as counsel could be heard, why an order should not be granted substituting Kingdon Gould and myself as Executors of the Estate of George J. Gould, deceased, in his place and stead as defendants in this action, reviving the same against said executors and the Estate of George J. Gould, deceased, without prejudice to the previous rights of the plaintiffs.

2. On October 15, 1925, and for many years prior thereto, I was, ever since have been, and now am a citizen of the State of New Jersey, having my home in that State, living at Highland Park, New Brunswick, New Jersey.

3. George J. Gould, who in his lifetime, was one of the defendants in this action, died on May 16, 1923. At the time of his death he was and for over twenty years prior thereto had been continuously a citizen of and domiciled in the State of New Jersey, near Lakewood, in Ocean County.

4. At his death, George J. Gould left a Last Will and Testament, executed by him about May 27th, 1922, wherein he nominated Kingdon Gould and myself for Executors.

5. On June 4, 1923, said Will was duly admitted to probate as the Last Will and Testament of George J. Gould, deceased, by the Surrogate of Ocean County, in the Orphans' Court, in the County, in the State of New Jersey, and Kingdon Gould and affiant have duly qualified in the offices of Executor under such Will, there was issued to [fol. 37] him and to me on said day out of such court by such Surrogate Letters Testamentary with copy of such Will annexed. Ever since we have been and now are acting as such Executors under such Will and under the Letters Testamentary issued from the said Orphans' Court, and not otherwise.

6. Neither Kingdon Gould nor this affiant has sought any executorial power or authority from the courts of any other state than the State of New Jersey. Nor have any proceedings been taken for the probate of said Will other than as above stated.

7. Affiant is advised and believes, and so avers, that no specific property of the Estate of George J. Gould is involved in or is the subject of this action, nor has the court in this cause ever taken charge of any specific property of said deceased. Affiant has never appeared in his capacity as such Executor to seek, nor has he ever sought the aid of this court to enforce any right of the deceased, George J. Gould.

8. Affiant is advised and believes, and so avers, that he and Kingdon Gould, as such executors and under the direction and control of the proper courts of New Jersey, must administer said estate in conformity to the laws of the State of New Jersey; and that the proper courts of that State, and none other, must dispose of such estate and determine the aid of this court to enfore any right of the deceased, and all claims against it and what, if anything, should be paid by such estate on account of any such claim or claims.

9. Affiant is advised and believes, and so avers, that there is no law of the State of New Jersey permitting affiant

and Kingdon Gould, or either of them, as an executor or [fol. 38] executors of said estate to be sued in the courts of New York, or any state other than New Jersey.

10. From a short time after the probate of the Will of George J. Gould in New Jersey his estate and executors have maintained and still do maintain an office of the estate at 15 Exchange Place in Jersey City, New Jersey, in the same building in which they maintained such office in December, 1923, when affiant Raphael Brill declared in his affidavit supporting the order to show cause of December 24, 1923, "and they have a place of business at 15 Exchange Place, Jersey City, New Jersey." Also from a time shortly after the death of George J. Gould these executors have employed and retained general counsel for said estate in New Jersey, such counsel being the firm of McCarter & English having offices in the City of Newark, New Jersey.

11. The office at 165 Broadway referred to in the affidavits of Messrs. Brill and Marshall was sub-leased to George J. Gould by Consolidated Coal Company. That sub-lease was in force at the death of George J. Gould and is still in force. It will not expire until May, 1926. The occupancy of those offices is under that sub-lease and not otherwise.

12. The property known as "Furlough Lodge" in the Catskill Mountains and the seat on the New York Stock Exchange of George J. Gould were both sold prior to May, 1925. Neither his executors nor his estate holds any property, or since May, 1925, has held any property, in the State of New York, for the so-called impounded income, referred to in the affidavit of James Marshall, was withheld by the [fol. 39] executors of Jay Gould, deceased, and never has come into the possession or control of the estate of George J. Gould, deceased.

13. Affiant does not consent to submit to the jurisdiction of the courts of New York in this action, or to any proceeding therein looking toward the fixing or fastening, or the attempt to fix or fasten, any money or other liability upon or against the Estate of George J. Gould, or upon the Executors thereof, or either of them. Affiant respectfully elects to challenge and now does challenge the power of this

court to so act, and respectfully submits as grounds for granting this cross-motion the following:

(a) The order to show cause and the service thereof each involves an attempt by this court in a proceeding not in rem to subject a citizen of the State of New Jersey under substituted service in that State to the jurisdiction of this court.

(b) The order to show cause and the service thereof each involves an attempt by this court in a proceeding not in rem to subject to its jurisdiction a citizen of the State of New Jersey who derives his executorial power by appointment of a court of the State of New Jersey.

(c) The order to show cause and the service thereof each involves an attempt by this court in a proceeding not in rem to subject to its jurisdiction an officer appointed by the court of another State, and indirectly an attempt to subject the courts of the State of New York.

(d) The order to show cause and the service thereof each involves an attempt to induce this court to intervene in, and interrupt and interfere with, the due administration of [fol. 40] a New Jersey estate, under the authority of the State of New Jersey.

(e) The order to show cause and the service thereof each involves action by this court looking toward an ultimate determination by it in binding form, against the legal representatives of a deceased citizen of New Jersey as to validity or invalidity of claims asserted against such deceased.

(f) The order to show cause and the service thereof each involves action in furtherance of an attempt, in this court, to charge the estate of George J. Gould, a citizen of the State of New Jersey, whose estate is being administered under New Jersey law by that State, with an amount claimed, and which, if paid, must be paid by said estate in the course of its administration.

(g) The order to show cause and the service thereof each involves an attempt to ignore a loss of jurisdiction over the person of George J. Gould, suffered by this court upon the death of George J. Gould; and to carry this cause forward to a binding and conclusive judgment in the same

manner as might have been done were said George J. Gould still alive.

(h) Even where otherwise properly subject thereto, the executor of a deceased defendant, who was sued in his individual capacity, can be proceeded against only by original summons.

(i) The order to show cause and the service thereof represent attempts to raise anew in this case a question that has become res adjudicata and conclusively determined against the plaintiffs by the decision of the Court of Ap- [fol. 41] peals in this case rendered July 15, 1925, and reported in 240 N. Y., 379.

No previous application for the relief herein asked for has been made to any court or judge.

Wherefore, affiant, appearing specially and solely for the purpose hereof, prays that the order to show cause hereinabove referred to and the service thereof, may be each and both set aside and the reviver and substitution prayed for may be denied.

Schuyler Neilson Rice.

Sworn to before me this 23rd day of Oct., 1925. Herbert Peterson, Notary Public, Queens County. Queens Co. Clerk's No. 4973. N. Y. Co., Clk's No. 455, Reg's No. 7361. Commission expires March 30, 1927.

[fol. 42] In Supreme Court of New York

[Title omitted]

Affidavit of Kingdon Gould

State of New York,
County of New York, ss:

Kingdon Gould, appearing herein specially and solely for the purposes herein, being duly sworn, says:

1. On Thursday, October 15, 1925, I received by mail at 165 Broadway, New York City, one copy, and on the following day at the same place I received by mail another

copy (the latter being addressed to me at 160 East 72nd Street, New York City—which premises are now closed and in charge of a caretaker—and being readdressed to 165 Broadway), a document comprising eighteen typewritten pages, entitled in this matter "Affidavits and Order to [fol. 43] Show Cause to Revive Action." The affidavits, one by Raphael Brill and the other by James Marshall, were verified on October 8, 1925, and the order was signed on October 9, 1925, by Hon. Joseph M. Proskauer, Justice of the Supreme Court of the State of New York. The order required Schuyler Neilson Rice and myself to show cause at a Special Term of said court on Friday, October 23, 1925, or as soon thereafter as counsel can be heard, why an order should not be granted, substituting Schuyler Neilson Rice and myself as Executors of the Estate of George J. Gould, deceased, in his place and stead as defendants in this action; reviving the same against said Executors and the Estate of George J. Gould, deceased, without prejudice to the previous rights of the plaintiffs.

2. On October 15, 1925, and for many years prior thereto, I was, ever since have been, and now am a citizen of the State of New Jersey, having my residence in that state; and living at Lakewood, Ocean County, New Jersey.

3. George J. Gould, who in his lifetime, was one of the defendants in this action, died on May 16, 1923. At the time of his death he was and for over twenty years prior thereto had been continuously a citizen of and domiciled in the State of New Jersey, near Lakewood, in Ocean County.

4. At his death, George J. Gould left a Last Will and Testament, executed by him about May 27, 1922, wherein he nominated Schuyler Neilson Rice and myself for Executors.

5. On June 4, 1923, said Will was duly admitted to probate as the Last Will and Testament of George J. Gould, deceased, by the Surrogate of Ocean County, in the [fol. 44] Orphans' Court, in that County, in the State of New Jersey, and Schuyler Neilson Rice and affiant having duly qualified in the offices of Executor under such Will, there were issued to him and to me on said day out of such

court by such Surrogate Letters Testamentary, with copy of such Will annexed. Ever since we have been and now are acting as such Executors under such Will and under the Letters Testamentary issued from the said Orphans' Court, and not otherwise.

6. Neither Schuyler Neilson Rice nor this affiant has sought any executorial powers or authority from the courts of any other state than the State of New Jersey. Nor have any proceedings been taken for the probate of said Will other than as above stated.

7. Affiant is advised and believes, and so avers, that no specific property of the Estate of George J. Gould is involved in or is the subject of this action, nor has the court in this cause ever taken charge of any specific property of said deceased. Affiant has never appealed in his capacity as such Executor to seek, nor has he ever sought the aid of this court to enforce any right of the deceased, George J. Gould.

8. Affiant is advised and believes, and so avers, that he and Schuyler Neilson Rice, as such executors and under the direction and control of the proper court of New Jersey, must administer said estate under and in conformity to the laws of New Jersey; and that the proper courts of that State, and none other, must dispose of such estate and determine the validity or invalidity and the nature and amount of any and all claims against it and what, if any-[fol. 45] thing, should be paid by such estate on account of any such claim or claims.

9. Affiant is advised and believes, and so avers, that there is no law of the State of New Jersey permitting affiant and Schuyler Neilson Rice, or either of them, as an executor or executors of said estate, to be sued in the courts of New York, or any state other than New Jersey.

10. From a short time after the probate of the Will of George J. Gould in New Jersey his estate and executors have maintained and still do maintain an office of the estate at 15 Exchange Place in Jersey City, New Jersey, in the same building in which they maintain such office in December, 1923, when affiant Raphael Brill declared in his affidavit supporting the order to show cause of December

24, 1923, "and they have a place of business at 15 Exchange Place, Jersey City, New Jersey." Also from a time shortly after the death of George J. Gould these executors have employed and retained general counsel for said estate in New Jersey, such counsel being the firm of McCarter & English having offices in the City of Newark, New Jersey.

11. The office at 165 Broadway referred to in the affidavits of Messrs. Brill and Marshall was sub-leased to George J. Gould by Consolidated Coal Company. That sub-lease was in force at the death of George J. Gould and is still in force. It will not expire until May, 1926. The occupancy of those offices is under that sub-lease and not otherwise.

12. The property known as "Furlough Lodge" in the Catskill Mountains and the seat on the New York Stock Exchange of George J. Gould were both sold prior to May, [fol. 46] 1925. Neither his executors nor his estate holds any property, or since May, 1925, has held any property, in the State of New York, for the so-called impounded income, referred to in the affidavit of James Marshall, was withheld by the executors of Jay Gould, deceased, and never has come into the possession or control of the estate of George J. Gould, deceased.

13. Affiant does not consent to submit to the jurisdiction of the courts of New York in this action, or to any proceeding therein looking toward the fixing or fastening, or the attempt to fix or fasten, any money or other liability upon or against the Estate of George J. Gould, or upon the Executors thereof, or either of them. Affiant respectfully elects to challenge, and now does challenge the power of this court to so act, and respectfully submits as grounds for granting the cross motion the following:

(a) The order to show cause and the service thereof each involves an attempt by this court in a proceeding not in rem to subject a citizen of the State of New Jersey under substituted service in that State to the jurisdiction of this court.

(b) The order to show cause and the service thereof each involves an attempt by this court in a proceeding not in rem

to subject to its jurisdiction a citizen of the State of New Jersey who derives his executorial powers by appointment of a court of the State of New Jersey.

(c) The order to show cause and the service thereof each involves an attempt by this court in a proceeding not in rem to subject to its jurisdiction an officer appointed by the [fol. 47] court of another State, and indirectly an attempt to subject the courts of the State of New York.

(d) The order to show cause and the service thereof each involves an attempt to induce this court to intervene in, and interrupt and interfere with, the due administration of a New Jersey estate, under the authority of the State of New Jersey.

(e) The order to show cause and the service thereof each involves action by this court looking toward an ultimate determination by it in binding form, against the legal representatives of a deceased citizen of New Jersey as to the validity or invalidity of claims asserted against such deceased.

(f) The order to show cause and the service thereof each involves action in furtherance of an attempt, in this court, to charge the estate of George J. Gould, a citizen of the State of New Jersey, whose estate is being administered under New Jersey law by that State, with an amount claimed, and which, if paid, must be paid by said estate in the course of its administration.

(g) The order to show cause and the service thereof each involves an attempt to ignore a loss of jurisdiction over the person of George J. Gould, suffered by this court upon the death of George J. Gould; and to carry this cause forward to a binding and conclusive judgment in the same manner as might have been done were said George J. Gould still alive.

(h) Even where otherwise properly subject thereto, the executor of a deceased defendant, who was sued in his individual capacity, can be proceeded against only by original summons.

[fol. 48] (i) The order to show cause and the service thereof represent attempts to raise anew in this case a question that has become res adjudicata and conclusively determined against the plaintiffs by the decision of the Court of Appeals in this case rendered July 15, 1925, and reported in 240 N. Y., 379.

No previous application for the relief herein asked for has been made to any court or judge.

Wherefore, affiant, appearing specially and solely for the purpose hereof, prays that the order to show cause hereinabove referred to and the service thereof, may be each and both set aside and the reviver and substitution prayed for n[illegible] be denied.

Kingdon Gould.

Sworn to before me this 22nd day of October, 1925. Ivan C. Humphrey, Notary Public, Delaware County. (Seal.)

[fol. 49] In Supreme Court of New York

[Title omitted]

Affidavit of George W. C. McCarter

State of New York,
County of New York, ss:

George W. C. McCarter, being duly sworn according to law, on his oath deposes and says:

1. I am a member of the Bar of the State of New Jersey, having been admitted as an attorney by the Supreme Court, November Term, 1911, and as a counsellor, November Term, 1914, and have been since my admission, in active practice at the Bar of that State with offices in the City of Newark, New Jersey.

2. The Surrogate in each of the several counties of the State of New Jersey has statutory jurisdiction to admit to probate wills of persons dying a resident of his county, [fol. 50] where no doubts appear on the face of the will

and no caveat against the probate thereof has been filed; and has jurisdiction to issue letters testamentary to executors named in a will, probate of which he has granted. Under and by virtue of Section 67 of an act of the Legislature of the State of New Jersey, entitled "An Act Respecting the Orphans' Court, and Relating to the Powers and Duties of the Ordinary of the Orphans' Court and Surrogates (Revision of 1898)," commonly called the Orphans' Court Act, as amended by Chapter 48 of the Laws of 1920, the Surrogate has jurisdiction to order executors to give public notice to the creditors of a decedent to bring in their debts, demands and claims against the decedent's estate, under oath, within six months from the date of such order. This order is commonly called in the New Jersey practice the order limiting creditors. Under and by virtue of Section 70 of the Orphans' Court Act, the Surrogate is empowered, upon proof of the due publication of the order limiting creditors, to decree that all creditors of the decedent who have not brought in their claims within the time in the order limiting creditors directed, shall be barred from any action therefor against the executor. This decree is commonly called the decree barring creditors. That section of the statute provides that any creditor who shall have neglected to bring in his claim (which, by another section, is directed to be verified) within the time so limited, shall be forever barred of any action against the executors with certain limited exceptions.

3. I understand that the Last Will and Testament of George J. Gould, deceased, has been admitted to probate by the Surrogate of the County of Ocean, New Jersey, and [fol. 51] that letters testamentary have been issued under said will by that Surrogate to Schuyler Neilson Rice and Kingdon Gould as executors. Such being the case, those executors must account to the Orphans' Court of Ocean County, New Jersey. As such executors they cannot safely pay or liquidate any disputed claim against the estate of George J. Gould unless such claim has been presented as hereinabove stated. I understand the order limiting creditors in said estate and of said deceased has been duly made by said Surrogate of the County of Ocean, in New Jersey; that the notice to creditors required by said order

has been duly given; that the time to bring in debts, demands and claims against said estate under said order and notice expired on December 5, 1923, and that said Surrogate, after proof of due publication of said order limiting creditors, has duly passed and entered the decree barring creditors in said estate.

I have advised Schuyler Neilson Rice and Kingdon Gould, whose affidavits accompany my own, that as executors of the Estate of George J. Gould deceased they are subject to the direction and control of the proper courts of the State of New Jersey and must administer such estate according to the laws of New Jersey; that its courts alone must determine the validity or invalidity, nature and proper amount of claims against such estate and what should be paid thereon from the assets of such estate.

4. At all times herein named I have been and am a member of the law firm of McCarter & English. That firm has been the attorneys for the executors and estate of George J. Gould, deceased ever since the probate of the will of said deceased in New Jersey. I am the member of my firm, who [fol. 52] has personally conducted the law business of said estate and said executors, and am familiar with the proceedings had in connection with the administration of said estate. I attach hereto a chronological chart showing in sequence the steps taken and things done in connection with that administration.

G. W. C. McCarter.

Sworn to and subscribed this 23rd day of October, 1925, before me, a notary public, in and for the county and state aforesaid, as witness my hand and official seal. Herbert Peterson, Notary Public, Queens County. Queens Co. Clerk's No. 4973. N. Y. Co. Clk's No. 455, Reg. No. 7361. Commission expires March 30, 1927.

[fol. 53] EXHIBIT TO AFFIDAVIT OF GEORGE W. MCCARTER

Chronological Statement of Proceedings in New Jersey in the Course of the Administration of the Estate of George J. Gould, Deceased, Referred to in the Annexed Affidavit

1923.

June 4th. Will admitted to probate by Surrogate of Ocean County and letters testamentary issued to Kingdon Gould and Schuyler Neilson Rice.

June 4th. Order requiring creditors of decedent to bring in their debts, demands and claims against the estate within six months from the date thereof.

June 4th to Dec. 5th. Claims filed and allowed in the total sum of $118,342.72.

June 4th to Dec. 5th. Claims filed with Executors by following named claimants, in following amounts, which claims were disallowed, as follows:

1. Edith Gould Wainwright	$945.05
2. Jay Gould and Charles P. Noyes, as Executors of Edith Kingdon Gould, deceased	1,452,000.00
3. Bankers Trust Company, The Equitable Trust Company of New York, and The Farmers' Loan & Trust Company, as substituted Trustees under the Last Will and Testament of Jay Gould, deceased	83,600,000.00
[fol. 54] 4. United States Trust Company of New York, as substituted Trustee under the Will of Jay Gould, deceased, Frank J. Gould, Helen Gould de Montenach and Dorothy Gould	70,000,000.00
5. Marie Louis Jean Jay Georges Paul Ernest Boniface de Castellane, Georges Gustave Marie Antoine Boniface de Castellane, Charles Maurice Jason Howard Duke de Sagan, Helen Violette de Talleyrand, Jason Honore Louis Sever de Castellane, and Anna Gould Duchesse de Talleyrand	52,600,000.00

6. Helen G. Shepard, Edwin Gould and Howard Gould, surviving Executors of the Last Will and Testament and Codicils of Jay Gould, deceased, and as co-trustees under certain trusts created by and under the Last Will and Testamen and Codicils of Jay Gould, deceased ..... Not stated.

Nov. 28th. Executors of George J. Gould made third party defendants to counterclaim of Commercial Trust Company of New Jersey, et al., in suit in Court of Chancery of New Jersey commenced against said defendants by Guinevere S. Gould, docket 54, page 539 (hereinafter called the Million Dollar Suit).

Dec. 5th. Decree of Surrogate barring creditors who have not brought in their claims from any action against the executors of George J. Gould.

Dec. 31st. Executors filed bill in Court of Chancery for [fol. 55] Judicial settlement of accounts of decedent as Trustee for Jay Gould, his son, docket 55, page 57 (hereinafter referred to as the Jay Gould Accounting Suit).

1924

Jan. 1st to May 7th. Suits commenced in the Court of Chancery of New Jersey against the executors by the claimants who filed the disallowed claims hereinabove stated, numbered 2, 3, 4 and 5, all such suits being commenced within three months after the Executors of George J. Gould served statutory notice of disallowance of claim.

Jan. 5th. Bill filed in Court of Chancery of New Jersey, docket 55, page 72 (hereinafter referred to as the Art Treasures Suit) by Executors of George J. Gould against Executors of Edith K. Gould, deceased, et al., to settle the title to certain works of art as between the two estates.

May 7th. Decree on first accounting, showing balance of $15,417,288.99, and containing the following restraint: "Provided that the accountants

shall not pay any of the debts of the said decedent or legacies or devises under his Will without the further order of the Court."

1925

Jan. 22nd. Settlement agreement entered into between Executors of George J. Gould, Executors of Edith K. Gould, Guinevere S. Gould, Jay Gould, and Commercial Trust Company of New Jersey and Schuyler Neilson Rice, as Trustees under various trusts by members of the Gould family.

Feb. 10th. Bill filed by Executors of George J. Gould in [fol. 56] Court of Chancery of New Jersey, docket 57, page 479 (hereinafter referred to as the Settlement Suit) against other parties to the aforesaid settlement agreement and all beneficiaries under the Will of George J. Gould, and all claimants whose claims had been disallowed, and who had commenced suit thereon within time, as above stated.

Mar. 25th. Decree on second account of Executors of George J. Gould, finding balance of $14,203,696.76, and containing the following provision: "Provided that the accountants shall not pay any of the debts of said decedent or legacies or devises under his Will, without the further order of this Court or the Court of Chancery.

Apr. 1st. Suits commenced in Court of Chancery of New Jersey by widow and infant children of George J. Gould against his Executors, to compel payment of income under his Will, docket 57, page 700 (hereinafter referred to as the income suits).

July 7th. Final decree in settlement suit, approving same, but restraining payments thereunder until the further order of the Court on notice.

July 7th. Final decree in income suits by infant children, providing for payment of $10,000 a year each. No mention is made of the usual administrative steps, such as transfer tax proceedings under the Laws of New Jersey, other states, and of the United States of America.

[fol. 57] IN SUPREME COURT OF NEW YORK

[Title omitted]

AFFIDAVIT OF WILLIAM WALLACE, JR.

COUNTY OF NEW YORK,
State of New York, ss:

William Wallace, Jr., being duly sworn, deposes and says: I am a member of the law firm of Chadbourne, Stanchfield & Levy, which firm is named in the affidavit of Raphael Brill and James Marshall, verified October 8, 1925. These are the affidavits referred to as supporting affidavits in the order to show cause, signed by Justice Joseph M. Proskauer, and dated October 9, 1925.

I have compared this order to show cause with the order to show cause dated December 24, 1923, and signed in this action by the Hon. William P. Burr, Justice of the Supreme Court. The mandatory part of these two orders is word for word alike, save, of course, that the return dates are different, and save that the direction in the former to mail to [fol. 58] the Executors at 15 Exchange Place, Jersey City, is replaced in the latter by a direction to mail to affiant's former or present law firm at 120 Broadway, New York City.

Each of the orders to show cause was supported by affidavits of Messrs. Brill and Marshall and by no other affidavits. I have compared the two affidavits of Brill. They are word for word the same, except that in the one supporting the order of October 9, 1925, the prayer for an order allowing service includes service by mailing to affiant's present or former law firm at 120 Broadway, New York City; also the body of the last named affidavit omits the averment (found in the earlier affidavit), that the Executors have a place of business at No. 15 Exchange Place, Jersey City; and in lieu thereof avers that they have a place for the transaction of estate business at 165 Broadway, New York City; also it omits reference to an advice from affiant's former firm that its authority had terminated by the death of George J. Gould and instead charges that that firm is still attorney for the deceased George J. Gould and is doing business under the name of Chadbourne,

Stanchfield & Levy, at 120 Broadway, New York City; also the latter affidavit, at the end thereof, undertakes to set forth in qualification of the statement that there has been no other application for the relief sought, part of the proceedings under the earlier application had subsequent to the making of his earlier affidavit, and the later affidavit ends with the statement that the present application is to revive the action and to substitute the Executors of George J. Gould under authority and in pursuance of Section 160 of the Decedent Estate Law, as amended by Chapter 253 of the Laws of 1925.

[fol. 59] I have also compared the two above affidavits of James Marshall. They are word for word alike, save that the later affidavit charges that Kingdon Gould still has an office at 165 Broadway; that the Executors of George J. Gould maintain an office for the transaction of estate business at 165 Broadway, New York City, and in place of the averment in the earlier affidavit that Chadbourne, Babbitt & Wallace are appearing as attorneys for the Executors, it charges that that firm has combined with Chadbourne, Stanchfield & Levy, and the new firm is doing business at 120 Broadway, New York City.

I submit a chronological statement of the happenings in connection with the earlier order to show cause of December 24, 1923. As to such of the papers as are printed therein, I give page references to the printed "Papers on Appeal" (the record) in the Court of Appeals as follows:

Chronology

12/22/23	Affidavit of Brill (supp.)	61
12/24/23	Order to show cause	58
1/24/24	Affidavit of James Marshall (supp. and in opposition to motion to vacate)	70
	Read in support.	
	Summons	7
	Complaint	8
	Amended answer of George J. Gould	36
	5th defense of amended answer of Herrick	58
12/28/23	Notice to vacate order and service	98
12/28/23	Affidavit of Rice and Kingdon Gould in supp.	100, 106

1/24/24 Affidavit of Rice and Kingdon Gould in opposition 81, 88
[fol. 60] Brief for Plaintiffs.
Brief for Executors.
2/13/24 Order for review and substitution and denying motion to vacate 3
3/ 5/24 Notice of appeal to Appellate Division 1
Brief for appellant executors.
Brief for plaintiff respondents.
7/ 2/24 Order reversing on opinion in Rogers case 113, 123
Opinion in Rogers case 125
9/11/24 Notice of Appeal to Court of Appeals 114
10/10/24 Order allowing appeal on certified question .. 117
10/29/24 Notice of appeal under leave 120
11/25/24 Brief of appellants.
Brief of respondent executors.
Supplemental brief of executors.
11/24/24 Appeal argued.
1/21/25 Decision affirming Appellate Division (No opinion).
1/22/25 Remittitur signed.
4/14/25 Notice and affidavit for reargument.
Appellants' brief in support.
Executors' brief in opposition.
5/12/25 Order granting reargument.
6/—/25 Reargument.
6/—/25 Brief in opposition for executors.
Brief for appellants.
Reply brief for appellants.
7/15/25 Final decision of Court of Appeals.

[fol. 61] The opinion of the Appellate Division in the case of Rogers, et al. v. Gould, et al., which was made the basis of the order of reversal herein (for order see 210 App. Div., 806), is found in 210 App. Div., page 15, et seq.

Plaintiff's notice of motion for leave to reargue in the Court of Appeals was dated April 14, 1925, two weeks after the approval of Chapter 253. The motion was declared to be made.

"On the ground that Chapter 253 of the New York Session Laws of 1925, approved * * * on April 1, 1925

* * * entitles the appellants herein to a reversal of the order of the Appellate Division * * * and to the affirmance of the order of the Special Term, theretofore reversed by the Appellate Division as aforesaid." Chapter New York Session Laws, Appellate Division, Special Term and Appellate Division.

In the affidavit of Mr. Louis Marshall, made in support of the foregoing motion, affiant says he is informed that the Court of appeals

"considered Helme v. Buckelew, 229 N. Y., 363, as decisive * * * in view of the fact that Section 160 of the Decedents Estate Law * * * did not contemplate * * * an action for a judgment in personam against foreign executors."

He then quotes the amendatory Act (Chapter 253) italicizing all the added new matter. He closed his affidavit thus:

"It is earnestly prayed that a re-argument be granted [fol. 62] herein in order that they may be an early determination as to the rights of the parties in the light of the enactment of Chapter 253 of the New York Laws of 1925."

In his brief entitled: "Appellant's Points on Motion for Re-argument" Mr. Marshall specifies his contention thus:

"It is our contention that Chapter 253 of the Laws of 1925 * * * controls the question as to whether or not this action abated as against George J. Gould upon his death, and whether his executors appointed in the State of New Jersey, where he was domiciled, may be substituted as defendants herein in his stead."

He closed that brief with this sentence:

"We contend that Chapter 253 of the Laws of 1925 gives that power."

The re-argument was granted against the opposition of the executors of George J. Gould.

In the brief in opposition affiant urged two points only:

(1) The amended section has no application to the instant case, and

(2) The amended section is unconstitutional.

Affiant made the same contentions upon the reargument. Mr. Marshall urged that the amendment directly covered the case and was both applicable and constitutional. The final opinion of the Court of Appeals rendered July 15, 1925, is reported in 240 N. Y., 379, et seq. As the volume is [fol. 63] not yet in print affiant for convenience attaches hereto a copy of the court's opinion. Affiant calls special attention to the following portions of the opinion:

"This is an action to recover a judgment in personam. The motion is for leave to continue the action against foreign executors against a deceased defendant. The executors are not domiciled in this State and the purpose of the action is solely to establish the personal liability of the defendants. * * *

Reargument in the light of the new statute was thereupon allowed * * * leaving procedural difficulties aside. The basic question is whether the statute (L. 1925, Ch. 253) is constitutional. As reargument was ordered on that question it should be answered: * * * The reasoning in Helme v. Buckelew (supra) clearly indicates that the law is unconstitutional as to foreign administrators. Following the leading case consistency requires us to say that the Statute registers a futile effort to bind foreign administrators by a judgment in personam and as to them is unconstitutional in its inception. * * * As to * * * executors the point was saved in the leading case but was carefully considered by Cardozo, J. * * * We must now extend our decision to cover the point. The intimation of the court is clear. The executor as (an) individual and as an official is in the theory of law two persons. Even as to foreign executors, there must be a domicile or possession which gives to the res to be administered a situs in New York. This conclusion seems inevitable, * * * but the purpose of the New York statute is to permit the revival [fol. 64] of suit against the foreign representative for a judgment in personam without restriction or qualification. It does not discriminate between a case where there are assets and a case where there are no assets; between an attempt to reach assets and an attempt to get a general judgment in personam * * *. The concept of a foreign non-resident executor without assets in this State as present

in his fiduciary capacity is as difficult as the discarded concept of a foreign corporation as present in this State merely because one of its directors is found here" * * *.

The statute draws no distinction between executors and administrators. If it were wholly good as to executors, we might infer that the Legislature desired to go as far as possible in bringing into the jurisdiction the foreign representatives of decendents' estates and hold it valid in part. On the other hand, we might infer that the legislative intent was to put executors and administrators on the same footing and then we should treat the statute as a whole in determining its validity. The trouble is that, in permitting the revival of all pending actions by bringing in foreign executors of deceased defendants, if the cause of action survives, it goes much too far to enable us to separate the good from the bad, whether we adopt one figment or the other. (Pollock v. Farmers' L. & T. Co., 157 U. S., 429.)

It therefore follows that, on the authority of recent and persuasive dicta in Helme v. Buckelew (supra), as herein enlarged, the constitutional requirement of due process of [fol. 65] law precludes the Legislature from providing generally for continuing actions for judgments in personam against the foreign executors or administrators of deceased defendants."

The determination by the Court of Appeals in its decision rendered July 15, 1925, that Chapter 253, Laws of 1925, was unconstitutional, was a determination of one of the two principal questions directly before the court on the reargument. Indeed, it was the particular question to determine which the reargument had been allowed. While a decision of either of these two questions in accordance with the contention of affiant demanded an affirmance of the judgment of the Appellate Division, neither one more than the other was a dictum for each was directly raised and involved in the case.

The employment of affiant's law firm and himself in matters affecting George J. Gould was automatically terminated by the later's death. Later on affiant's firm was employed by the executors of George J. Gould to render professional services for them as such executors in any matters affecting the estate of George J. Gould arising out of the administration of the estate of his father, Jay Gould.

Later on they were also employed in connection with the effort of the plaintiffs in this case to obtain jurisdiction over them in this court and cause as executors. Neither he nor either law firm to which he belonged was employed by such executors for any other purpose.

On account of the proceedings hereinabove chonologically recited, costs have been regularly taxed, and on September 18, 1925, retaxed, in this cause, against these plaintiffs and in favor of such executors, in the combined amount [fol. 66] of $453.25. Though requested in writing so to do on September 22, 1925, plaintiffs have failed and negected to pay any part of these costs. They are now wholly due and owing.

William Wallace, Jr.

Sworn to before me this 24th day of October, 1925.
Walter G. McGahan, Notary Public, Kings County.

Clerk's No. 172, Register's No. 7070.
Certificate filed in N. Y. County.
Clerk's No. 165, Register's No. 7126.
Commission expires March 30, 1927.

[fol. 67] In Court of Appeals of New York

Henry W. McMaster and Francis H. Skelding, as Receivers, etc., Appellants,

v.

George J. Gould, et al., Respondents

(Decided July 15, 1925)

Rehearing of appeal by plaintiffs from order of Appellate Division, first department, reversing an order of Special Term which granted plaintiffs' motion to substitute the executors of the will of George J. Gould, deceased, as parties defendant and denying the motion.

Louis Marshall for appellants.

William Wallace, Jr., for respondent, also filing a brief as amicus curiæ.

OPINION

POUND, J.: This is an action to recover a judgment in personam. The motion is for leave to continue the action against foreign executors of a deceased defendant. The executors are not domiciled in this State and the purpose of the action is solely to establish the personal liability of defendants. After our decision herein was handed down to the effect that the action could not be continued, chapter 253 of the Laws of 1925 took effect. It amends section 160 of the Decedent Estate Law by adding a subdivision thereto which reads as follows:

"2. An action or proceeding pending in any court of this state in which the court shall have obtained jurisdiction of the person of a defendant or respondent who is domiciled in any other state, territory or district of the United States [fol. 68] or in any foreign country shall, if the cause of action survives, not abate by reason of the death of such defendant or respondent, but his executor or administrator duly appointed in such state, territory or district of the United States or foreign country, shall, upon the application of the adverse party, and upon such notice as the court may prescribe, be brought in and substituted in the place of the decedent and the action or proceeding shall continue."

Re-argument in the light of the new statute was thereupon allowed.

We held in Helme v. Buckelew (229 N. Y., 363), that section 1836-a of the Code of Civil Procedure was not to be construed to remove the immunity of foreign executors or administrators from action in this State. In the current case the same rule was applied when it was sought to continue an action against the personal representatives of a deceased defendant, no satisfactory distinction being found between starting a suit and continuing it. The question of the constitutionality of a statute which in terms permitted suit to be brought or continued against foreign executors and administrators was not presented, but it is now presented.

The respondent urges that we may not reach that question in this case.

1. It is contended that as the subdivision added to section 160 by chapter 253 was omitted from the later amendment of the same section by chapter 603, it was by implication repealed. The two acts passed at the same session may not be construed as inconsistent if they may fairly be read otherwise. (People ex rel. Chadbourne v. Voorhis, 236 N. Y., 437, 444.) They may be fairly read otherwise. The [fol. 69] title to chapter 253 is as follows: "An act to amend the Decedent Estate Law, in relation to suit by foreign executors and administrators and continuing actions and proceedings against such executors and administrators." The title to chapter 603 is as follows: "An act to amend the Decedent Estate Law, in relation to proof required to enable a foreign executor or administrator to sue and be sued in this state." It thus appears that the two amendments relate to wholly different matters, and are consistent and that repeal of the former statute by the latter will not be implied.

2. It is contended that because passed after the decision of the Appellate Division, paragraph 2, chapter 253 cannot affect the review by this court of that decision. The case came to this court upon a certified question which reads as follows: "Did the court at Special Term have power to substitute * * * pursuant to the proceedings instituted by the plaintiffs herein for that purpose?" This court reviews the question certified and no other. The question of the effect of chapter 253 was not discussed or considered. It is a new question presented for the first time in this court. The decision may not be invalidated by a statute passed subsequently. We cannot consistently answer the question in the affirmative even though the constitutionality of the statute is upheld. In Robinson v. Robins Dry Dock & Repair Co. (238 N. Y., 271), we held that where a procedural statute, intended to be retroactive and to apply to pending litigation, is enacted after judgment and pending appeal the court may dispose of the case in accordance with the law as changed by the statute. But there the appeal was from a judgment and not on a certified question. If the court below was right when it certified the question it is still right.

[fol. 70] Leaving procedural difficulties aside, the basic question is whether the statute (L. 1925, ch. 253), is constitutional. As re-argument was ordered on that question it should be answered. The rule to be applied is stated as follows: "Proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law." (Pennoyer v. Neff, 95 U. S., 714, 733.) The reasoning in Helme v. Buckelew (supra), clearly indicates that the law is unconstitutional as to foreign administrators. Following the leading case, consistency requires us to say that the statute registers a futile effort to bind foreign administrators by a judgment in personam and as to them is unconstitutional in its inception. The foreign administrator as the official of another sovereignty exists only by virtue of the statute of another State and has no legal existence in this State.

As to executors the point was saved in the leading case but was carefully considered by Cardozo, J. He points to a distinction. "The only effect of probate in their case is to authenticate an existing title." But he asserts: "We are not referred to any precedent in any court of final review which upholds our right to say that the foreign executor as executor is present in New York when neither domicile nor possession gives to the res to be administered a situs in New York" (p. 369).

We must now extend our decision to cover the point. The intimation of the court is clear. The executor as individual and as an official is in the theory of law two persons. Even as to foreign executors, there must be a domicile or possession which gives to the res to be administered a situs [fol. 71] in New York. This conclusion seems inevitable. If we go back to the historic origin of the executor's position we find that he once took the assets in his own right. ("Executors in Earlier English Law" by Holmes, 9 Harvard Law Review, 42.) No reason could then be given why he should not be sued wherever he could be found. But at the present day both executors and administrators hold the assets of the estate in a fiduciary capacity. The will is the source of the executors power and letters testamentary are evidence of his authority, but the rights and liabilities of both executors and administrators in respect to the fund in

their hands are like those of trustees. The wide distinction between the nature of the title of executors and administrators had disappeared but this essential difference as to the source of title remains; the foreign administrator exists only by virtue of the statute of another State; the executor's authority springs from the will and not from the letters testamentary. (Dodd v. Anderson, 197 N. Y., 466.) Should the State of New York see fit to recognize the foreign letters testamentary as proof of the executor's authority, it might allow an action against the foreign executor which would be effective against any property held by him here in his executorial capacity. The situs of the assets would be the basis of jurisdiction. The executor would be here to administer his trust. But the purpose of the New York statute is to permit the revival of suit against the foreign representative for a judgment in personam without restriction or qualification. It does not discriminate between a case where there are assets and a case where there are no assets; between an attempt to reach assets and an attempt to get a general judgment in personam. The California executor [fol. 72] traveling in New York might be served with a summons. The executor of a deceased party to an action, wherever domiciled, might be notified to appear and defend. The concept of a foreign non-resident executor without assets in this State as present in his fiduciary capacity is as difficult as the discarded concept of a foreign corporation as present in this State merely because one of its directors is found here. (Riverside & Dan River Cotton Mills v. Menefee, 237 U. S., 189.) Regarding the foreign executor as a trustee rather than as an owner, even his presence in the State as an individual does not imply his presence as executor unless assets in the State or other trust duties to be performed here make his presence an incident of his fiduciary capacity and he must be present in the State as executor before judgment in personam can be entered against him.

To the suggestion that no harm would be done in allowing judgment to be entered in New York in all such cases, the answer is that the very act of fixing without a hearing by judicial action a sum due would in and of itself be repugnant to the due process clause. (Riverside & Dan River Cotton Mills v. Menefee, supra.)

The statute draws no distinction between executors and administrators. If it were wholly good as to executors, we might infer that the Legislature desired to go as far as possible in bringing into the jurisdiction the foreign representatives of decedents' estates and hold it valid in part. On the other hand, we might infer that the legislative intent was to put executors and administrators on the same footing and then we should treat the statute as a whole in determining its validity. The trouble is that, in permitting the [fol. 73] revival of all pending actions by bringing in foreign executors of deceased defendants, if the cause of action survives, it goes much too far to enable us to separate the good from the bad, whether we adopt one figment or the other. (Pollock v. Farmers' L. & T. Co., 157 U. S., 429.)

It, therefore, follows that, on the authority of recent and persuasive dicta in the Helme v. Buckelew (supra), as herein enlarged, the constitutional requirement of due process of law precludes the Legislature from providing generally for continuing actions for judgments in personam against the foreign executors or administrators of deceased defendants.

The order should be affirmed, with costs, and question answered in the negative.

Hiscock, Ch. J., Cardozo, McLaughlin, Andrews and Lehman, JJ., concur; Crane, J., concurs in result.

Order affirmed.

[fol. 74] In Supreme Court of New York

[Title omitted]

Affidavit of No Opinion

State of New York,
County of New York, ss:

Raphael Brill, being duly sworn, deposes and says:

I am managing attorney in the office of Louis Marshall, counsel for the plaintiffs herein and am familiar with all the proceedings herein.

No opinion was rendered by Mr. Justice Proskauer herein

except the following memorandum: "McMaster v. Gould—Motion to substitute executors is denied (McMaster v. Gould, 240 N. Y., 379)."

Raphael Brill.

Sworn to before me this 8th day of January, 1926. Jacques J. Benjamin, Notary Public. Kings Co. No. 210. Kings Co. Register's No. 6206. Certificate filed New York County No. 408. New York County Register's No. 6371. Certificate filed Richmond County. Certificate filed Westchester County. Certificate filed Reg. Off. Westchester Co. Commission expires March 30, 1926.

[fol. 75] IN SUPREME COURT OF NEW YORK

STIPULATION WAIVING CERTIFICATION OF APPELLATE DIVISION RECORD

Pursuant to Section 170 of the Civil Practice Act it is hereby stipulated that the foregoing consists of true and correct copies of the notice of appeal, the resettled order appealed from and all the papers used upon the hearing of the motions upon which the order appealed from was made and of the whole thereof, now on file in the office of the Clerk of the County of New York.

Certification thereof, pursuant to Section 616 of the Civil Practice Act, is hereby waived.

Dated, New York, January 8th, 1926.

Larkin & Perry, Attorneys for Plaintiffs-Appellants. Chadbourne, Stanchfield & Levy, Gillespie & O'Connor, Attorneys for Kingdon Gould and Schuyler Nielson Rice, as Executors of the Estate of George J. Gould, deceased, appearing specially and solely for the purposes of this motion only.

[fol. 76] In Supreme Court of New York — Appellate Division

3176. Affirmance of Order

Henry W. McMaster and Francis H. Skelding, as Receivers, etc., Applts.,

v.

Georg J. Gould, et al., Defts., Impleaded with Schuyler Neilson Rice and Kingdon Gould, as Executors, etc., Respts.

Order of Affirmance—Jan. 29, 1926

An appeal having been taken to this court by the plaintiffs from an order of the Supreme Court, New York County, dated the 2nd day of November, 1925, as resettled by an order entered on the 16th day of November, 1925, denying plaintiffs' motion to substitute Kingdon Gould and [fol. 77] Schuyler Neilson Rice, as executors of the Estate of George J. Gould, deceased, as parties defendant, and granting cross motion of said executors to vacate and set aside service of the order to show cause, and said appeal having been argued by Mr. Louis Marshall of counsel for the appellants, and by Mr. William Wallace, Jr., of counsel for the respondents; and due deliberation having been had thereon,

It is hereby unanimously ordered that the order so appealed from be and the same is hereby affirmed with $10 costs and disbursements to the respondents.

Enter,

J. P. C.

[fol. 78] In Supreme Court of New York—Appellate Division

[Title omitted]

Order Denying Motion for Leave to Appeal to Court of Appeals—Feb. 11, 1926

The above named plaintiffs having moved for leave to appeal to the Court of Appeals from the order of this court entered herein on the 29th day of January, 1926,

[fol. 79] Now, upon reading and filing the notice of motion with proof of due service thereof, and the affidavit of Louis Marshall in support of said motion, and after hearing Mr. Louis Marshall for the motion, and no one appearing in opposition thereto,

It is hereby unanimously ordered that the said motion be and the same is hereby denied with $10 costs.

Enter,

J. P. C.

IN SUPREME COURT OF NEW YORK

[Title omitted]

NOTICE OF APPEAL TO COURT OF APPEALS

SIRS:

Please take notice that the plaintiffs herein hereby appeal to the Court of Appeals from the order of the Appellate Division of the Supreme Court, First Judicial Department, [fol. 80] entered herein in the office of the Clerk of said Court on the 29th day of January, 1926, affirming a resettled order entered in the office of the Clerk of the County of New York on the 16th day of November, 1925, denying a motion made by the plaintiffs to substitute Kingdon Gould and Schuyler Neilson Rice as executors of the estate of George J. Gould, deceased, as parties defendant in this action in the place and stead of George J. Gould, deceased, and reviving this action against said executors of the estate of said George J. Gould, deceased, without prejudice to the previous rights of the plaintiffs herein under Chapter 253 of the Laws of 1925, and granting the cross-motion made by Kingdon Gould and Schuyler Neilson Rice as executors of the estate of George J. Gould, deceased, for an order vacating and setting aside the service of the order to show cause herein dated October 9, 1925, and vacating and setting aside said order to show cause; and from each and

every part of said order entered as aforesaid on the 29th day of January, 1926.

Dated, New York, February 23, 1926.

Yours, etc., Larkin & Perry, Attorneys for Plaintiffs, 80 Broadway, Borough of Manhattan, New York City. Louis Marshall, Esq., of Counsel for Plaintiffs, 120 Broadway, Borough of Manhattan, New York City.

[fol. 81] To Messrs. Chadbourne, Stanchfield & Levy, 120 Broadway, New York City. Messrs. Gillespie & O'Connor, 20 Vesey Street, New York City, Attorneys for Kingdon Gould and Schuyler Neilson Rice, as Executors of the Estate of George J. Gould, deceased, appearing specially and solely herein for the purpose of objecting to the jurisdiction of the court over such Executors. The Clerk of the County of New York. The Clerk of the Appellate Division—First Department.

[fol. 82] In Supreme Court of New York

Affidavit of No Opinion by Appellate Division

State of New York,
County of New York, ss:

Raphael Brill, being duly sworn, deposes and says:

I am Managing Attorney in the office of Louis Marshall, counsel for the plaintiffs herein, and am familiar with all the proceedings herein. No opinion was rendered by the Appellate Division of the Supreme Court for the First Judicial Department in deciding the appeal herein.

Raphael Brill.

Sworn to before me this 15th day of March, 1926. Jacques J. Benjamin, Notary Public. Kings Co. No. 210. Certificate filed New York County No. 408.

[fol. 83] IN SUPREME COURT OF NEW YORK

STIPULATION WAIVING CERTIFICATION OF APPELLATE DIVISION RECORD

Pursuant to Section 170 of the Civil Practice Act it is hereby stipulated that the foregoing consists of true and correct copies of the Notice of Appeal, the Order Appealed From and all the papers upon which the Appellate Division acted in making the Order Appealed From, and the whole thereof, now on file in the office of the Clerk of the County of New York.

Certification thereof, pursuant to Section 616 of the Civil Practice Act, is hereby waived.

Dated, New York, March 15, 1926.

Larkin & Perry, Attorneys for Plaintiffs-Appellants.
Chadbourne, Stanchfield & Levy, Gillespie & O'Connor, Attorneys for Kingdon Gould and Schuyler Neilson Rice, as Executors of the Estate of George J. Gould, deceased, appearing specially and solely for purposes of objecting to the jurisdiction of the Court over such Executors.

Clerk's Certificate to foregoing Transcript omitted in printing.

[fol. 84] IN SUPREME COURT OF NEW YORK

[Title omitted]

ORDER ON REMITTITUR—Filed May 28, 1926

The plaintiffs having appealed to the Court of Appeals from an order of the Appellate Division of the Supreme Court, First Judicial Department, entered in the office of the Clerk of said Court on the 29th day of January, 1926, affirming a resettled order entered in the office of the Clerk of the County of New York on the 16th day of November, 1925, and said appeal having duly come on for argument and having been duly argued in the Court of Appeals, and

the Court of Appeals having after due deliberation ordered and adjudged:

That the appeal from the order of the Appellate Division of the Supreme Court herein be dismissed with costs, and the proceedings in said Court be remitted to the Supreme Court, there to be proceeded against according to law, and having remitted unto the Supreme Court its judgment and the record on appeal as aforesaid,

[fols. 85 & 86] Now, upon reading and filing said remittitur dated May 15, 1926, it is on motion of Chadbourne, Stanchfield & Levy, appearing specially herein for the purpose of objecting to the jurisdiction of the Court over Kingdon Gould and Schuyler Neilson Rice, as executors of George J. Gould, deceased,

Ordered and adjudged that the order of the Court of Appeals be and the same hereby is in all respects made the order of this Court.

John M. Tierney, Justice of the Supreme Court of the State of New York.

[fol. 87] In Court of Appeals of New York

[Title omitted]

Clerk's Certificate to No Opinion

I, Wm. J. Armstrong, Clerk of the Court of Appeals of the State of New York, do hereby certify that no opinion in writing was handed down by said Court of Appeals of the State of New York in dismissing the appeal herein, on May 14, 1926.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court of Appeals at the City of Albany in the State of New York this seventeenth day of June A. D. 1926.

Wm. J. Armstrong, Clerk. (Seal Court of Appeals, State of New York.)

[fol. 88] IN SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 18, 1926

The petition herein for a writ of certiorari to the Supreme Court of the State of New York is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.